PAPER WALLS

The Law that is Meant to Keep Rental Housing Healthy

How can tenants in substandard rental housing in New Zealand protect themselves?

How can New Zealand's housing law be used to raise rental housing standards?

The Social Justice Unit of the Anglican Diocese of Christchurch released this report in November 2013.

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Introduction

Tenants have a right to live in healthy homes. New Zealand has several laws that try to protect that basic right, but these laws are complex, spread out and hard to use. As well as that, there are some key pressure points where the law undermines tenants' rights and needs to change.

This report analyses the laws that protect healthy housing in New Zealand. The Residential Tenancies Act 1986, Health Act 1956, Housing Improvement Regulations 1947 and the Building Act 2004 are discussed in turn. The effect of New Zealand's international legal obligations is also explored at length.

A case study is woven through this report, illustrating how the law applies to Mere, a tenant of a sub-standard home. Mere's story illustrates several of the new arguments that this report uncovers for tenants to use when working with the Tenancy Tribunal, their Local Authority or the Ministry of Business, Innovation and Employment.

Two key, new findings in this report are:

Tenants can prevent their landlord from renting their home out again before bringing it up to housing health standards. This gives tenants a new tool against abusive landlords, and is discussed at 2.4 of this report.

Tenants can take their landlord to the District Court where the condition of their house poses a danger to their health. This gives tenants and tenant advocacy groups a chance to raise the profile of housing health issues and create legal precedent to give more certainty for tenants in the future. This is discussed at 3.2 of this report.

The conclusion can be used as a guide to the key themes in this report.

There are several resources yet to come to accompany this report. These include one-page summaries of key findings of this report, and a website format of this report at paperwalls.org.

This report may also be downloaded from anglicansocialjustice.org.nz.

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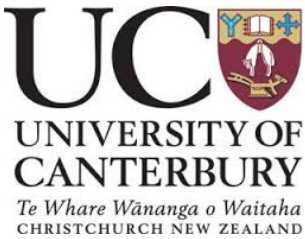

Disclaimer:

This report does not count as 'legal advice'. There are plenty of good lawyers around, and really helpful services like the Tenants Protection Association and the Community Law Centres, so get in touch with them if you want help with your particular situation.

Table of Contents

Mere's Story

Mere lives in a sub-standard house with mould, leaking and cracking issues.

Her story is told on pages 10, 13, 18, 22, 29, 38, 41, 44, 52 and 60 of this report. Mere's story illustrates most of the key points in this report, and is best read alongside the accompanying legal discussion.

1. New Zealand Domestic Law: Overview

The health and safety standards for rental housing in New Zealand are spread across several pieces of legislation. Some of these pieces of legislation are accompanied by 'Legislative Instruments' – rules, regulations and codes that help to apply or interpret the piece of 'parent' legislation. These pieces of law are usually understood separately, but create exciting potential when understood together. Decisions made by courts or tribunals help to interpret the legislation and legislative instruments.

Taken together these pieces of legislation, legislative instruments and decisions form New Zealand's domestic law for health standards in housing:

- The Residential Tenancies Act 1986 is the first port of call for residential tenants. It creates certain rental housing standards that the Tenancy Tribunal enforces. Section 45(1)(c) Residential Tenancies Act gives the Tenancy Tribunal the power to enforce standards created in other pieces of legislation and legislative instruments.

- The Health Act 1956 criminalises some instances of unhealthy housing and gives several responsibilities for housing standards to Local Authorities. The Housing Improvement Regulations 1947 is a set of old but measurable housing standards that help to make the Health Act 1956 more directly applicable to people's housing situations.

- The Building Act 2004 ensures certain health and safety standards for all buildings in New Zealand. It contains two main tools for raising housing standards. The Building Code was created to make the Building Act 2004 more directly applicable to buildings. The Building Act creates special rules for building that are dangerous or insanitary.

- Local Authorities can create bylaws to help apply the Building Act and Health Act in their territories, and show the public what their response will be in different situations. This is an area of significant untapped potential.

- Each of these pieces of legislation and legislative instruments create requirements that the Tenancy Tribunal can enforce under section 45(1)(c) of the Residential Tenancies Act.

2. Residential Tenancies Act 1986: First Port of Call for Tenants

This section is about:

- *Standards*: What the heath and safety standards are in the Residential Tenancies Act and what constitutes an 'unlawful act';
- *Jurisdiction*: What kinds of disputes can be brought before the Tenancy Tribunal;
- *Orders & Enforceability*: What the Tenancy Tribunal can do with cases that come before it;
- *Exemplary Damages & 'Further Commission Orders'*: Particular powers of the Tenancy Tribunal when dealing with 'unlawful acts'; and
- *Process*: Important features of the Tribunal's process that are relevant to anyone trying to bring a 'test case' on health and safety standards.

2.1. Standards

Section 45 Residential Tenancies Act (RTA) gives landlords several responsibilities to provide and maintain houses at certain standards. These responsibilities sit in balance with the tenants' responsibilities under the RTA. Section 45 is set out in full in the appendix. Key points to note are:

- Section 45, subsections 1(a), 1(b) and 1(c) are the focus of this research paper.
- Subsections 1(a) and 1(b) set out housing standards that landlords must comply with. These housing standards are significant to the health and safety of tenants.
- Subsection 1(c) is a portal provision, which imports standards from other pieces of legislation into the jurisdiction of the Tribunal.
- Subsection 1A[1] is subtle but very important. It provides that *failing to comply with the housing standards in section 45 subsections 1(a), 1(b) and 1(c) is an unlawful act.* The Tribunal has more powers than usual when dealing with situations where an unlawful act has been carried out.
- Subsection 3 is a significant protection for tenants, as it allows them to hold a landlord to the landlord's obligations under subsection 1, even if they knew that

[1] Subsection 1A is a distinct subsection to subsection 1(a). This may be confusing if you haven't read section 45 in the appendix yet.

the property did not meet those obligations when they entered into the tenancy agreement.

- Subsection 4 is a significant protection for landlords, limiting their liability where the tenant has breached the tenant's obligations that are set out in section 40 of the RTA.

Sections 59 and 59A RTA provide for when premises have been destroyed or damaged so severely that they are rendered uninhabitable. Obviously, these have been used heavily following the Christchurch earthquakes. However, they sit outside the focus of this report.

2.1.1. Reasonable state of cleanliness – section 45(1)(a)

> *"The landlord shall **provide** the premises in a **reasonable** state of **cleanliness**"*

The landlord's responsibility to *provide* reasonably clean premises corresponds to the tenant's responsibility to *maintain* the cleanliness of the premises.[2]

The word 'reasonableness' means that the standard of cleanliness required is relative to the context: factors like the age, condition, type or rent of the premises. The 'reasonableness' concept makes it more difficult to use reasonable cleanliness as an absolute standard that can create simple rules applicable across many different houses. This means that a tenant in one house cannot automatically rely on the tenant's success in arguing a particular standard in another case.

This subjectivity may make this standard a less attractive focus for a 'test case' seeking certainty. The lack of an absolute standard that can be easily understood and counted on puts tenants in a weak position.

The responsibility in section 45(1)(a) exists at the start of the tenancy, and is not negated by a tenant's notice of the uncleanliness of a property. A tenant could sign the lease and straightaway hold the landlord to cleaning the property. This is certainly a better course than claiming halfway through or at the end of the tenancy that the premises were not clean.[3]

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[2] S 40(1)(c) Residential Tenancies Act 1986.
[3] *Online Realty Ltd v Armstrong* TT Hamilton 207/05, 2 February 2006.

The concept of 'providing' the premises may go beyond the chronological meaning. If the premises is unreasonably prone to uncleanliness, for instance by inherent dampness leading to constant and significant mould growth, then it could be argued that the landlord is not providing the property in a reasonable state of cleanliness from day-to-day during the tenancy.

Section 45(1)(a) is a symptoms standard, not a causal standard. For example:

- A tenant of a mouldy or mildewy house could use section 45(1)(a) to require a landlord to clean the mould or mildew away at the start of the tenancy, regardless of what caused the mould or mildew.[4]

- If it can be shown that the inherent dampness of a premises is causing mould or mildew, then this will have to be pursued under a different part of section 45. Sections 45(1)(b) and 45(1)(c), discussed below, may be helpful in doing this.

The distinction between section 45(1)(a) and the other standards can be understood in this example as the difference between cleaning up the symptoms at the start of the tenancy and dealing with a cause that may be ongoing.

It is important to answer the questions of onus and evidence[5] when thinking how to bring Tribunal proceedings under section 45(1)(a). The onus is on the tenant to show that the premises were not reasonably clean when they were provided. Evidence to support this would include photos or videos from the start of the tenancy, or photos or videos of the current state of the property coupled with evidence that the current state of cleanliness could not have arisen in the term of the tenancy. For instance, if the property is full of mould a week into the tenancy, the tenant will not need photos from a week earlier to make out their case.

[4] For instance, it would not matter whether the mould or mildew was caused by prior tenants, by a leak, or occurred in the time between tenants.
[5] 'Onus' is about who has to prove something: The 'onus' is on the party who has to show that something happened. 'Evidence' is about proof: what a party uses to show what happened.

Mere's Story

When Mere rented her home, it already had substantial mould and mildew in the bathroom. She took a photo of this at the time. She asked her landlord to clean it at the time and has continued to ask for a month. Mere can require her landlord to clean the mould and mildew that was there when she moved in.

There was also extensive mould and mildew in the south-facing bedrooms at the start of the tenancy, but Mere has lost her photo of this mould and mildew. If she is able to persuade the Tribunal that this mould and mildew could not have built up over her time in the property, she may be able to get a work order to have this mould and mildew cleaned as well.

Mere's situation is likely to be resolved in the mediation process in the Tribunal. Mere's case is not weakened by the fact that she knew the condition of the property when she moved in.

Mere's story continues with more options on page 13.

2.1.2. Reasonable state of repair – section 45(1)(b)

> *"The landlord shall **provide and maintain** the premises in a **reasonable** state of **repair** having regard to the age and character of the premises and the period during which the premises are likely to remain habitable and available for residential purposes"*

This responsibility is more onerous on the landlord than the responsibility for cleanliness. The landlord has to provide the premises in a reasonable state of repair, and then maintain the premises in a reasonable state of repair. This corresponds to the tenant's obligations to notify the landlord as soon as possible of any damage or need for repairs, and to not intentionally or carelessly damage, or permit any other person to damage, the premises.[6]

[6] Ss 40, 41 Residential Tenancies Act 1986.

The landlord will not be liable to repair damage resulting from the tenant breaching these two obligations.[7] This means that if a tenant fails to notify a landlord of any damage or anything needing repairs, and further damage arises from that failure to notify, then although the initial damage was not caused by the tenant, liability for that further damage may fall to the tenant rather than the landlord.

Having said this, section 45(1)(b) requires the landlord to be diligent in monitoring the state of repair of the premises, which may go beyond simply responding to what the tenant informs the landlord about. In one case the landlord sued the tenant for damage caused by water leaking and rotting the floor over a period of time.[8] The leak was only visible at the bottom of a cabinet. The Tribunal's decision is not entirely clear from the summary available, but the adjudicator clearly contemplated a duty on a landlord to inspect the property regularly:

> "The landlord's failure to arrange regular inspections or have the property more formally managed has increased the extent of the loss to the landlord, in that a problem which was originally relatively minor became a significant problem".

As with section 45(1)(a), the section 45(1)(b) standard is *reasonable* repair, and so is not absolute. Section 45(1)(b) specifically contemplates that factors like the age of the property and how much longer it is likely to remain habitable will affect the landlord's responsibilities regarding repair. These factors help us to interpret the 'reasonableness' standard. Again, the reasonableness standard makes this a less certain and less helpful provision for tenants. For example, tenants in premises of different ages will find it hard to rely on others' successes in the Tribunal or even in Court when negotiating the standard to be upheld in their own home.

It is difficult to find case reports relevant to this research that interpret this repairs and maintenance standard alone. When this standard has been argued in health and safety-related proceedings, it has been argued alongside section 45(1)(c), and section 45(1)(c) has been the crux of the Tribunal or District Court's decision.[9] This reflects the lack of

[7] S 45(4) Residential Tenancies Act 1986.
[8] *Glass v Mills & Leckie* TT Waitakere 09/00280/HE, 26 March 2009.
[9] For example, *Guerrero v Short* Auckland TT 2656/02 13 December 2002.

certainty offered by the 'reasonableness' standard when compared to the more concrete standards available (albeit less obviously) under section 45(1)(c).

Section 45(1)(b) offers tenants two good lines of argument. The first is for a tenant to require the landlord to repair and maintain safety or health features advertised in a property – safety rails and insulation for example. The second argument would centre on the repair of any holes, cracks, fractures or the like that lead to drafts, increased moisture or other problems likely to cause downstream health issues.

In certain circumstances, tenants may repair a property themselves and require the landlord to compensate them. This can happen where a property is:

- in a state of disrepair;
- the state of disrepair has arisen otherwise than as a result of a breach of the tenancy agreement by the tenant;
- the state of disrepair is likely to cause injury to people or property or is *otherwise serious and urgent*.; and
- the tenant has given the landlord notice of the state of disrepair or made a reasonable attempt to do so.[10]

The power for tenants to do repairs then charge the landlord may make it more effective for tenants in some situations to act first and require the landlord to pay later rather than going to the Tribunal first to require the landlord to carry out repairs. It is unclear whether the 'otherwise serious and urgent' threshold would be met by a state of disrepair that posed a danger to health. It would be very interesting for a tenant or tenant's advocacy group to test the law on this point.

The questions of onus and evidence are more complicated under section 45(1)(b) than they were under section 45(1)(a). The onus is on the tenant to show that the premises are not in a reasonable state of repair. The onus is then on the landlord to show that the damage or state of repair is due to the tenant breaching their obligations.[11] The landlord

[10] S 45(1)(d) Residential Tenancies Act 1986.
[11] S 45(4) Residential Tenancies Act 1986.

can do this by showing that the damage arose during the time of the tenancy and is not fair wear and tear.[12] If the landlord shows this, then the onus is back on the tenant to show that the damage or lack of repair did not arise from them intentionally or carelessly damaging, or allowing another person to damage, the premises.[13]

Mere's Story

Water seems to be leaking in through cracks around Mere's windows. This has caused damage to $200 of her bedding. Mere's landlord should repair the cracks and compensate Mere for the cost of the damaged bedding.

Mere's property was advertised as insulated, but the insulation has not been kept in a reasonable state of repair and is therefore ineffective. It has worn through or ripped in several places. Mere may be able to require her landlord to repair the insulation to a reasonable state.

In both of these cases, Mere can talk with her landlord about her rights, or apply to the Tenancy Tribunal for a work order. Compensation is appropriate for the damage to the bedding.

Mere's story continues with more options on page 18.

2.1.3. Requirements under other enactments - section 45(1)(c)

> *"The landlord shall comply with **all requirements** in respect of **buildings, health, and safety** under **any enactment** so far as they apply to the premises."*

Section 45(1)(c) is used much more than sections 45(1)(a) and (b).

While sections 45(1)(a) and (b) create housing standards under the RTA, section 45(1)(c) does not create its own standards. Instead, it imports the standards created in

[12] S 40(4) Residential Tenancies Act 1986.
[13] S 40(4), 40(2)(a) Residential Tenancies Act 1986.

all other enactments[14] in New Zealand into the scheme of the RTA. This means that the Tribunal can use its orders and enforceability powers to protect tenants from breaches of any requirements in other enactments too.

There are several important enactments which section 45(1)(c) brings within the Tribunal's powers, in particular:

- The Health Act 1956
- The Housing Improvement Regulations 1947
- The Building Act 2004 and Building Code
- Local Government Bylaws

The requirements that each of these enactments put on landlords and tenants are analysed later in this report.

2.2. Jurisdiction

The Tenancy Tribunal's main jurisdiction is to determine disputes between residential landlords and tenants.[15] The Tribunal has to work and make its decisions in a way that is most likely to ensure the fair and expeditious resolution of disputes between landlords and tenants. It determines each dispute according to the general principles of the law relating to the matter, merits and justice of the case, but is not bound to give effect to strict legal rights, obligations or technicalities.[16]

A landlord and a tenant cannot agree between themselves to exclude the Tribunal's jurisdiction: they are under the Tribunal's jurisdiction even if they do not want to be.[17]

For our purposes, there are some significant limitations on the jurisdiction of the Tribunal. Each of these is explained more below.

- The Tribunal will not usually have jurisdiction over disputes about the landlord's conduct as a provider of health or disability services.[18]

[14] The word 'enactment' doesn't just mean acts of Parliament. It includes both acts of Parliament, and regulations passed using acts of Parliament.
[15] S 77(1) Residential Tenancies Act 1986 contains a more technical definition.
[16] Section 85 Residential Tenancies Act 1986.
[17] S 81 Residential Tenancies Act 1986.

- The Tribunal has a financial limitation: it may not require anybody to do work or pay in excess of $50,000. A party with a claim over $50,000 can choose to pursue just part of its claim.[19]

- The usual health and safety standards in the RTA do not apply to several 'excluded tenancies', set out in section 5 of the RTA.

If an issue is within the Tribunal's jurisdiction, then it can only be brought initially before the Tribunal, and not before another court or decision-making body.[20] If issues are outside of the Tribunal's jurisdiction, for instance a landlord's liability for offences committed under the Health Act, then they cannot and need not be brought before the Tribunal.

Orders made by the Tribunal are not in any way binding on future decisions of the Tribunal in other proceedings. Because they are not searchable according to keyword or the sections of legislation that they are decided on, Tribunal orders also do very little to build up a 'body of law' that can be consistently applied. Having said that, past orders are still helpful to understand the mind of different Tenancy Tribunal adjudicators in interpreting provisions of the RTA and other pieces of legislation.

2.2.1. Financial Limitation

It is unclear how the financial limitation applies to proceedings where an order for more than $50,000 is sought. Foreseeably, a party may inflate the sum sought so as to have their claim heard in the District Court. Anybody wishing to bring a test case may want to make it straight into the District Court, both to achieve greater legal certainty and to achieve a higher profile for the test case. If a test case may result in work orders or compensation over $50,000, then the financial limitation will need to be navigated with care.

A High Court case from 2000 sheds some light on this issue.[21] The plaintiff claimed over $100,000 from the defendant in a civil suit in the High Court. Part of this was a deposit,

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[18] S 77(4A) Residential Tenancies Act 1986.
[19] S 77(5),(6) Residential Tenancies Act 1986.
[20] S 82(1) Residential Tenancies Act 1986.
[21] *Auckland City Apartments Ltd v Stars and Stripes 2000 Ltd* HC Auckland CP429/99, 9 November 1999.

and part of it was rent that ought to have been paid. The defendant argued, among other points, that the Tribunal should shorten the tenancy to decrease the amount of rent that needed to be paid.

The High Court judge allowed some issues, including the length of the tenancy, to be determined in the Tribunal. The High Court still dealt with the monetary claim, as this part of the proceedings remained outside the Tribunal's jurisdiction. So, the claim was split between the jurisdictions issue-by-issue. The High Court judge acknowledged that this was an untidy state of affairs. Part of the untidiness is because the claim was brought as an ordinary civil suit, and the RTA arguments were separate from this core claim, as they were used as defences to it. This introduced more separation between the arguments and the sum than is usual in an RTA context.

Some other powers of the Tribunal and the District Court provide helpful context to understanding the financial limitation. The Tribunal can transfer any proceedings up to the District Court that the Tribunal cannot both hear and determine, or that would be more properly determined in the District Court.[22] The District Court can transfer proceedings down to the Tribunal if it determines that they ought to have been started in the Tribunal, or if the District Court is satisfied that the proceedings could be more conveniently or fairly dealt with in the Tribunal.[23]

Regardless of whether a claim may result in a payment or work over $50,000, it seems best to commence proceedings in the Tribunal, letting the Tribunal transfer the matter up to the District Court if it considers it proper to do so. It is not clear whether proceedings with a claim above the financial limitation may be brought in the District Court, and parties doing so would lose the benefit of the Tribunal's mediation process.

If a party to proceedings where more than $50,000 is disputed wants to ensure that all of the issues are heard in the District Court, rather than being split between courts, two arguments may help. First, it will be a strong argument that the Tribunal should not hear cases that it cannot determine in favour of one of the parties (the party seeking the sum over $50,000), as this introduces immediate bias into the process. It will also be a strong argument that in cases where an integral part of the case, like the amount of work

[22] Ss 82(1)(b), 83(1),(2) Residential Tenancies Act 1986.
[23] District Courts Rules 7.17, 7.33.

ordered to be done, has to be transferred to the District Court, the District Court should hear all of the matters too. It would be very strange for the Tribunal to hear all bar one of the issues, determine them, and then advise the District Court to order a certain sum to be paid, without the District Court exercising its own judgment over the issues.

2.2.2. Excluded Tenancies

Section 5 RTA excludes several kinds of tenancies from the protections that most tenants are offered under the RTA. Landlords have attempted to escape their responsibilities under the RTA by using the 'family home' exclusion as a 'loophole' provision:

n) where the premises, not being a boarding house, continue to be used, during the tenancy, principally as a place of residence by the landlord or the owner of the premises or by any member of the landlord's or owner's family:

Landlords have made 'family home' loophole attempts by arguing that because they live on the premises, at least some of the time, it is a family home. This can mean that the other people who live there and pay money to the landlord are unprotected tenants. Landlords would escape the RTA requirement to, for instance, carry out repairs or provide the room mould-free.

The first response to the 'family home' loophole attempt may be to argue that the house is in fact being used as a boarding house. If it is a boarding house, then it is not a family home. 'Boarding Houses' are defined in the RTA.[24] There must be: one or more boarding rooms; facilities for communal use by tenants; and six or more tenants at any one time (or at least an intention by the landlord that there be six or more tenants at any one time.) If this is the case, then the house is in fact a boarding house and the 'family home' loophole attempt fails.

The second response is to look more closely at the wording of the 'family home' exclusion. The premises must be used 'principally' as a place of residence by the landlord or a member of the landlord's family, at the time when the breach of the RTA occurs. This is not about whether the premises is the principal residence of the landlord or a member of their family – the focus of the exclusion is whether their living there is

[24] S 66B Residential Tenancies Act 1986.

the principal use of the premises.[25] You can imagine the type of situation that this exclusion was contemplated for, where three or four members of a family live in the family home and lease a room or two to others. If there is one landlord, and four or five tenants, then it seems that the principal use is for the tenants, not the landlord. In these situations, the RTA provisions should apply.

The second response is not a watertight response. Nonetheless, given that the statutory wording does not define a 'family home' well, this may be a helpful new argument against irresponsible landlords.

Mere's Story

Mere lives in the property with three other tenants, including the landlord's daughter.

Mere has talked to her landlord about some of the issues she is having with the property. However, her landlord said that as his daughter lives there, the property is a family home and he does not have to keep it at the same standards as under the Residential Tenancies Act.

Because most of the tenants are not from the landlord's family, Mere can argue that the property is *not* used principally as a place of residence by a member of the landlord's family. This means that the usual standards under the Residential Tenancies Act will apply.

Mere's story continues with more options on page 22.

2.3. Orders & Enforceability

Section 78 RTA lists some of the orders that the Tribunal may make. These sit alongside several more general powers that the Tribunal has under section 77. If the proceedings are appealed, the District Court, High Court and other appeal courts are also able to

[25] For this reason, the reasoning applied in *Main v Hooker* DC Christchurch CIV 2180/03, 2 February 2004 seems suspect. Nonetheless, the summary available in the Tenancy Tribunal's Consolidated Decisions of Interest is helpful reading.

make these or other orders. Because of their place in the scheme of the RTA, these can be called 'primary orders'.

Sections 106 – 108 provide ways that the Tribunal can enforce primary orders. These can be called 'secondary orders'.

Exemplary damages and 'further commission' orders can be made under sections 109 and 109A when an unlawful act has been committed. These are among the most significant, and least used, sections of the RTA.

2.3.1. Primary Orders: Section 78

Section 78 is in the appendix. Key points to note are:

- The Tribunal can order the landlord to carry out work to bring the premises up to the standards in sections 45(1)(a), (b) and (c);
- The Tribunal can order either party to pay money to the other;
- Section 78(2) provides that:
    - If the Tribunal orders the landlord to carry out work, but the landlord does not consent to doing the work, then the Tribunal must offer the landlord the option of paying money to the tenant instead; and
    - If the Tribunal orders the landlord to carry out work, and the landlord consents, then the Tribunal does not have to offer the option of paying the tenant instead.

The Tribunal may make interim orders to preserve the position of the parties until a primary order is made.[26]

The main interest in this report, understood in light of this section 78, is in testing a straightforward and achievable path to making sure that a work order is carried out.

[26] S 79 Residential Tenancies Act 1986.

Section 78(2) is a significant roadblock to ensuring that a work order is carried out. It provides both an option and an incentive for both landlord and tenant in many situations to not carry out the work order.

It is important to note that 'compensation' and the section 78(2) pay-out are separate concepts. If a tenant has suffered loss, they ought to be paid compensation. On top of that, if a work order is necessary to bring a property up to standards, then the pay-out option is just as separate from compensation as the work order would be. This makes sense: compensation is about harm done, while the work order (or in its place, the pay-out option) are about ensuring that it does not happen again. Tribunal orders should not force a tenant to choose between compensation and a work order.

In most situations, completely fairly, tenants may be more interested in a pay-out than a work order. This will especially be so if the proceedings have been ongoing, the tenancy has already been terminated, or the work order would make the house uninhabitable or undesirable to live in for a period of time while the work is done. Similarly, landlords are likely to favour the quick and easy route of paying some money, over the uncertain costs and long process of building work.

If a tenant is paid out and terminates the tenancy, then the next tenant will walk into just as poor quality a house as the last tenant left. That does not benefit tenants generally, improve housing standards, or equip other tenants with good precedent.

There are three responses to the disadvantage that section 78(2) poses for raising housing standards. The first is to incentivise the landlord, within the proceedings, to consent to a work order. The sum of money ordered to be paid as the alternative, or arguing that a landlord's unwillingness to repair reflects their character in a way that is disadvantageous to their case may both be good mechanisms to do this. The best response, seeking a 'further commission' order, is discussed below.

When determining the sum to be paid as the alternative, the Tribunal's reasoning could be based on rent abatements, the hypothetical cost of the work to be done, or the actual cost of the work to be done coupled with a statement that the conditions exist where a tenant can conduct their own repairs and charge the landlord.[27] The latter seems less

[27] Using the powers discussed at 2.1.2.

likely, as it restricts the landlord's property rights significantly. Although work orders were not usually sought or were unlikely to be helpful, the various Christchurch earthquake cases under a different part of the RTA have mostly resulted in terminations of tenancies or in rent abatements.[28]

The Tribunal can make interim orders within proceedings.[29] However, this power does not go far enough to enable the Tribunal to order a landlord to complete work before taking on a new tenant. This is because the Tribunal's jurisdiction is limited to the dispute between the landlord and the particular tenant involved in the proceedings.

2.3.2. Secondary Orders: Sections 106 – 108

The Tribunal is able to make further orders to enforce work orders, if neither the work order nor the alternative monetary order have been complied with.[30] The party whom the work order was made in favour of must apply to the Tribunal for enforcement. The Tribunal has a variety of options, including:

- To cancel or change the work order;
- To use any order from section 78 (discussed above);
- To give the tenant leave to *enforce* the monetary alternative to a work order;
- To empower the tenant to do the work ordered in a work order and charge it to the landlord; and/or
- To discharge or change any orders previously made by the Tribunal.

These powers will be only be useful when a landlord has not done the work or paid the tenant. There do not seem to be any cases or Tribunal orders on this section, and it is unclear how the Tribunal or a court would choose between the enforcement options in a particular case.

[28] For example, *Harcourts Accommodation Centre Ltd v Faldut* Christchurch TT 11-2307-CH 12 September 2011, *Flowers v Harcourts Accommodation Centre Ltd* Christchurch TT 11/2793/CH 20 September 2011.
[29] S 79 Residential Tenancies Act 1986.
[30] Section 108 Residential Tenancies Act 1986.

Mere's Story

Mere ended up having to take her landlord to the Tribunal, and the Tribunal made a work order. Her landlord had to either clean the mould and repair the cracks, insulation, or pay Mere $500 in compensation ($200 for her bedding, $300 for her loss of enjoyment of the premises) and a further $1100 as an alternative to the work being done. That made $1600 all up. Her landlord was ordered to comply within a month.

Two months have passed, and Mere's landlord has not done the work required. Mere is now able to go back to the Tribunal for a secondary order. Because she wants to live in her new house for several years, she wants the Tribunal to give her leave to enforce the monetary option, or empower her to do the work and charge it to the landlord. Her landlord needs to pay one way or the other.

Mere's story continues with more options on page 29.

2.4. 'Further Commission' Orders

The Tribunal may make a 'further commission' order. This may have the effect of forcing a landlord to bring their property up to the standards required under sections 45(1)(a), (b), (c) RTA.

There is a three-step process to obtain a 'further commission' order for this purpose:

1. The Tribunal determines that an unlawful act has been committed under section 45.
2. The Tribunal makes an exemplary damages order under section 109. There are two steps to this process:
    a) The 'intention' threshold; and
    b) Weighing whether an order is just.
3. The Tribunal makes a 'further commission' order under section 109A.

2.4.1. Step 1 - Unlawful Act

As discussed above, breaching the housing standards in sections 45(1)(a), (b) or (c) is an unlawful act. This includes breaching any of the requirements in other enactments that are imported by section 45(1)(c).

2.4.2. Step 2 - Exemplary Damages

The Tribunal may order the landlord to pay exemplary damages to the tenant if the landlord has committed an unlawful act.[31] Exemplary damages are available where the landlord has committed the unlawful act intentionally. The District Court has said in this context that the purpose of exemplary damages is "to punish and deter."[32]

The first step in seeking exemplary damages is a threshold test: it must be shown that the landlord meant to commit the act that was unlawful. Once this is established, then there is a weighing exercise: the Tribunal will determine whether it would be just to require the landlord to pay the tenant an extra sum of damages, up to $3,000.[33]

The courts have considered exemplary damages claims by tenants in several cases. Two important principles arise from the case law. The maximum penalty of $3,000 is reserved for the most serious cases.[34] Appeal judges may be reluctant to change the amount of exemplary damages ordered by a Tribunal Adjudicator.[35]

2.4.3. Step 2 a) - The Intention Threshold

A landlord doesn't need to know about section 45, housing standards, or what counts as an 'unlawful act' in order to form the intention to commit an unlawful act. The two planks of intention are that:

- the landlord leased a property, knowing its condition;
- the condition of the property breached the section 45 standards.

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[31] Section 109 Residential Tenancies Act 1986.
[32] *MacDonald v Dodds* DC Hamilton CIV-2009-019-1524, 26 February 2010 at [39].
[33] Schedule of 1A Residential Tenancies Act 1986.
[34] *MacDonald v Dodds* DC Hamilton CIV-2009-019-1524, 26 February 2010 at [41].
[35] *Arcadia Farms Ltd v Collinson-Smith* DC Nelson CIV-2008-042-132, 21 November 2008 at [35] – [39].

This is the standard approach to intention in law, and is implicit in District Court cases on section 109.[36] The intention threshold will be met in almost every case of a breach of the 'provide' standards in section 45. Notice by the tenant of the need to maintain or repair the property will probably give the landlord the knowledge needed for the first plank.

2.4.4. Step 2 b) – Are Exemplary Damages Just?

When the Tribunal weighs whether an exemplary damages order is 'just', it should conduct a broad inquiry into all relevant facts. Section 109 RTA gives four factors that this broad inquiry must consider:

- The intent of the landlord in committing the unlawful act;
- The effect of the unlawful act;
- The interests of the landlord or the tenant against whom the unlawful act was committed; and
- The public interest.

If a test case arises from this report, exemplary damages are only likely to be pursued towards the end of obtaining a 'further commission' order. When weighing what is 'just', it will probably be relevant that the Tribunal's decision would affect the availability of a 'further commission' order. The facts that give rise to the potential 'further commission' order will also dictate what is just in the particular situation. As such, this report will leave further discussion of the weighing exercise until after discussing 'further commission' orders.

2.4.5. Step 3 – The 'Further Commission' Order

> *"If the Tribunal makes an **order** against **a person under section 109** on the ground that the person has committed an unlawful act, the Tribunal may, if satisfied that it is in the **public interest** to do so, make an order **restraining** the **person** from committing a **further act of the same kind**."*

[36] *MacDonald v Dodds* DC Hamilton CIV-2009-019-1524, 26 February 2010, *Arcadia Farms Ltd v Collinson-Smith* DC Nelson CIV-2008-042-132, 21 November 2008.

If the Tribunal makes an order for exemplary damages, it may also make an order under section 109A RTA. Section 109A is set out in full in the appendix.

There do not seem to be any cases or Tribunal orders using section 109A. This suggests that it has not been used since its introduction in late 2010. Landlords facing proceedings under this section may be particularly likely to settle with a tenant out of court: either to minimize their expenditure on the property in those proceedings, or to stop a legal precedent arising that might affect their other tenancies.

This section may be a powerful tool against landlords who intend to lease their property out again, or who intend to continue to lease their property in an unlawful condition. By restraining the landlord from leasing their property unlawfully, a tenant may be able to force them to bring their property up to the section 45(1)(a), (b), (c) standards before it can be leased out again.

It is helpful to consider each word in bold separately before looking at the section as a whole:

- *An order… under section 109*: This is an exemplary damages order, as discussed above.
- *Person*: It may seem that this just affects individuals, but in law, legal entities like companies count as a 'person' too.
- *Public interest*: Showing what is in the 'public interest' will have to go beyond the interests of the tenant in question. Public health and wider housing stock arguments and evidence will be relevant. This takes section 109A beyond the normal scheme of the RTA, which otherwise tends to focus on a particular tenancy.
- *Restraining*: A 'further commission' order is about stopping a person from doing something, not compelling them to do something. Of course, restraining a landlord from leasing a property until work is done will put pressure on the timetable for doing that work.

- *Further act*: The unlawful act happens when a person who is a landlord fails to comply with the standards in sections 45(1)(a), (b) or (c). Leasing a property out sub-standard again will breach the 'provide' standards (a) and (b). For the 'maintain' or 'comply' standards (b) and (c), it may be that *continuing* to lease the property is a further act of the same kind. It will be important under section 109A to identify the particular act that was committed and ought to be restrained in future.

- *Of the same kind*: It is unclear how broadly this can be interpreted, but obviously if the initial case was about building standards, and the later concern was about harassment, then these are not of the same kind.

2.4.6. How to use sections 109 and 109A against a repetitively unlawful landlord

A hypothetical case study will helps to explore one way in which sections 109, 109A can be used. This case study is based on a real situation.

> *A landlord has leased their premises in breach of section 45. It has inherent dampness issues, mould that cannot be removed and holes in the wall and floor.*
>
> *The Tenancy Tribunal has found that the property is in breach of section 45, and that the landlord knew that it was in this condition when it was leased.*
>
> *The state of the property indicates that it has been in a similar condition for a long time. When proceedings were commenced, the landlord terminated the tenancy. The property is now being let to another tenant in substantially the same condition.*

In this instance, steps 1 and 2 a) of the further commission order process described above are satisfied.

Step 2 b) is about whether it is just for the Tribunal to order exemplary damages. Four factors are listed in the RTA, but others may be relevant.

- *The landlord's intent* in this instance is to lease out a property with obvious health and safety issues. The landlord is probably aware of the flow-on health effects for a tenant living in accommodation like this, and the increase it causes to the tenant's cost of living.

- *The effect of the unlawful act* may be quite extreme for the tenant involved. In the case that this case study is based on, a tenant with mental health issues also suffered from asthma while living in the house in question. After moving out, her asthma ceased to be a problem and her mental health improved.

- *The interests of the tenant against whom the unlawful act was committed*. This factor seems less directly relevant than the others. Obviously the ongoing interests of the tenant are strengthened by being paid exemplary damages, but the particular tenant gains little from a 'further commission' order being made when they have already left the property. The tenant has a moral interest in justice, albeit retributive justice, which can be fulfilled by the payment of exemplary damages.

- *The public interest* is served by punishing the landlord, as this deters other landlords from behaving in unlawful ways. Granting exemplary damages also allows the court to make a 'further commission' order, which serves the public interest by ensuring that the premises is not leased again in an unlawful condition. If a further commission order is granted, this should also signal to the market that landlords will no longer be able to let unlawful properties out, giving landlords a clear reason to ensure that their property is up to the section 45 standards.

These four factors come together to form a strong argument for exemplary damages in this kind of case. If, as is common, the landlord has neglected to pay a tenant or to carry out a work order, then this would strengthen the case for exemplary damages.

If the Tribunal orders exemplary damages, then the next step is to consider what arguments support making a 'further commission' order. The argument in the present case study would be that it is in the public interest to restrain the landlord from renting the property out in the same condition. There is also a public interest in forming and strengthening the legal precedent that landlords who repetitively offend under the RTA will be stopped from leasing their properties.

There will be a strong argument for landlords that 'further commission orders' are a significant restriction of their rights and freedoms as land-owners with indefeasible

titles. The public interest argument will need to show why, in the circumstances of the case, the public interest is best served by the landlord's rights and freedoms being restricted. This will probably require proof that there is a high likelihood of a further commission of the unlawful acts of the same kind. Evidence of past conduct will be very helpful in establishing this.

Importantly, it is not necessary to have a later tenant on board for this step – all that needs to be shown is a past unlawful act and the public interest in restraining a landlord from a further commission. The 'exemplary damages' factors do not have to be weighed up again with a later tenant in mind, or with a later tenant's consent: in fact the later tenant does not need to be involved in the proceedings at all. It is important to sound a cautionary note though: it will be much more difficult to gather evidence and to show that the 'public interest' is being served if a new tenant of a premises is resistant to a work order being carried out. The public interest argument will have to consider the effect of a further commission order on the tenancy of a new tenant. This could affect whether the Tribunal is willing to make an order, and what the terms of that order are.

A tenant may be both disinterested and disincentivised from pursuing a 'further commission' order. A tenant who has worked through the Tribunal process for damages, a work order, and even exemplary damages, may have been drained enough without then taking on showing the need for an order that they are unlikely to benefit from themselves. This may be an appropriate place in proceedings for the Ministry of Business, Innovation and Employment (MBIE) to exercise its jurisdiction to assume the conduct of proceedings, or to initiate proceedings on behalf of a party.[37] The MBIE's jurisdiction to do so in this particular situation is emphasised by repetition in section 109. Parliament clearly intended that the MBIE could be involved in such circumstances.

A tenant who wants to remain in a property may face the same disincentives here as under the Health Act scheme – that they may lose their home until and while repairs are being carried out. However, the Tribunal should seek to protect the tenant's security of tenure. The Tribunal is able to set a timeline for orders to be carried out, and can also order the tenancy to end, or rent be abated for a period.[38] The correct combination of

[37] S 124 Residential Tenancies Act 1986.
[38] S 78 Residential Tenancies Act 1986.

these orders should be able to protect a tenant in a particular circumstance. Knowing that this protection is available will lessen the disincentive problem.

Mere's Story

Mere's landlord continued refusing to pay or do the work ordered by the Tribunal. With winter on its way and a cold damp house, she felt that she had to move out, but wanted to make sure that her landlord wouldn't put other tenants in the same sub-standard house in the future.

Mere got in touch with the MBIE's compliance unit, who helped her to take her landlord back to the Tribunal for a 'further commission' order. She was able to show that the property must have been in the same bad condition when it was leased to the last tenant, and that the landlord had shown a complete disregard for property standards while she had lived in the house.

The Tribunal was satisfied that the landlord had intentionally breached housing standards, and that it was appropriate to order the landlord to pay exemplary damages to Mere.

Mere asked the Tribunal to order that the landlord could not lease the property again until it was brought up to legal standards. The MBIE compliance unit helped Mere with putting her arguments and evidence together, and supported her through the proceedings.

The 'further commission' order that the Tribunal made meant that Mere's landlord could not use letting agents, and would commit an offence punishable by a fine for letting the property out again in the future.

Mere's story continues with more options on page 38.

2.5. Process

2.5.1. Mediation

All Tribunal applications are referred to mediation, unless the parties have indicated that they will not go to mediation.[39] Mediation is provided by the Ministry of Building, Innovation and Employment. The mediator's role is to attempt to bring parties to settle on as many issues as possible, before referring outstanding issues to the Tribunal. The conduct of the parties may be relevant when the Tribunal later considers who pays the court and legal costs of the proceedings. The mediator may pass a summary of the facts agreed to by the parties to the Tribunal.[40] The Tribunal may later pass questions of fact back to be determined by a mediator.[41]

2.5.2. Timing

The Tribunal will give the parties 'reasonable notice' of the proceedings.[42] The mediation process must be carried out promptly.[43] Proceedings can take as long as two years between filing and a final order being made, exacerbated in particular by the 're-hearing' jurisdiction of the Tribunal.

2.5.3. Protections for Tenants

There are no laws protecting the tenant's tenure in a property while they are engaged in Tribunal proceedings. This means that landlords are able to give tenants notice to leave their homes as soon as they file proceedings in the Tribunal. This has two main flow-on effects:

- Tenants are disincentivised from applying to the Tribunal to protect their basic rights; and
- Tenants are less likely to value a work order for a home that they have had to leave, so are much more likely to favour the pay-out alternative under section 78(2). This leaves properties in the same poor condition for the next tenant to move into.

[39] S 87 Residential Tenancies Act 1986.
[40] S 88 Residential Tenancies Act 1986.
[41] S 99 Residential Tenancies Act 1986.
[42] S 91 Residential Tenancies Act 1986.
[43] Rule 14 Residential Tenancies Rules 2010.

2.5.4. Documents

Documents that have to be delivered to tenants can be delivered in a variety of ways, including to the tenant's 'address for service.'[44] Tenants should be very clear about how a landlord should or should not deliver documents to them, and ensure that any addresses that the landlord may use are current.

2.5.5. Who may attend a Tribunal hearing[45]

A tenant or landlord may take anybody with them as a supporter to a Tribunal hearing. There are restrictions on whom a party can have to speak on their behalf. A party may not be represented by a person who has been admitted to the bar, unless the dispute is for an amount over $6,000, both parties consent, or the government is a party to the proceedings. The Tribunal may also grant leave to be represented by a lawyer, if it is appropriate given the nature and complexity of the proceedings, or there is a disparity between the parties' ability to represent themselves. If one party has or is a lawyer, the other party may have a lawyer too.

The rules around representation are different for some tenants with disabilities. In any proceedings before the Tribunal, any manager or person appointed to administer another's affairs under the Protection of Personal and Property Rights Act 1988 shall, subject to that Act, manage the conduct of the case of the person whose affairs they manage or administer.[46]

2.5.6. Procedure and Evidence

The rules around procedure and evidence are flexible.[47]

The Court of Appeal has made a decision in the past that has the effect that mediators and adjudicators cannot use their own prior experience as evidence in a case.[48] If a party wanted to use the testimony of a mediator or adjudicator as evidence in a dispute, for instance as to the standard of a property in the past, then the best path would be to ask specifically to have the proceedings before a different mediator or adjudicator. If the

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[44] S 91A Residential Tenancies Act 1986.
[45] S 93 Residential Tenancies Act 1986.
[46] S 94 Residential Tenancies Act 1986.
[47] Ss 96, 97 Residential Tenancies Act 1986.
[48] *R v Wood* [1982] 2 NZLR 233.

Tribunal registrar is reluctant to do this, then the mediator or adjudicator should remove themself from the case (recuse themselves). This may arise in particular where a mediator has entered and inspected particular premises in prior proceedings.[49]

2.5.7. Costs

There are rules about who pays the costs of the proceedings.[50] These rules display a policy bias towards mediation. The Tribunal may not order costs unless: proceedings ought not to have been brought; parties were represented by lawyers; the matter should have been settled before a mediator and there is no reasonable excuse why it wasn't; or a party fails to show up to a hearing.

It will be contentious whether 'running a test case' is a reasonable excuse for not wanting to settle. The RTA's focus on resolving disputes simply and by agreement in mediation is admirable, but in this instance as in many others is unhelpful to tenants generally, as it discourages the creation of legal precedent and definite health and safety standards.

2.5.8. Appeals: Climbing the Courts Ladder

Particularly for a party seeking to create legal precedent, or to achieve a high profile for their case, the further their case can be heard up the hierarchy of courts the better.

The Tribunal may order a re-hearing of the whole or any part of proceedings on the ground that a substantial miscarriage of justice has occurred, may have occurred or is likely to occur.[51]

Tenants or Landlords may appeal to the District Court within 10 days of a Tribunal order.[52] The District Court will run according to the procedure under the RTA, which displaces parts of the usual District Court procedure.[53] The fact that the appeal is before the District Court does not by itself act as a stay on proceedings.[54] This means that the landlord or tenant can act in the interim as if the order being appealed was already in

[49] S 114 Residential Tenancies Act 1986 specifically gives mediators this power.
[50] S 102 Residential Tenancies Act 1986.
[51] S 105 Residential Tenancies Act 1986.
[52] S 117 Residential Tenancies Act 1986.
[53] Rule 14.1 District Court Rules 2009: the appeal provisions of the DCRs are subject to the Act under which the appeal is made.
[54] Rule 14.11 District Courts Rules 2009.

force. There are no strict time limits on when the District Court must hear or determine the appeal by, although District Courts will attempt to secure the just, speedy, and inexpensive determination of any proceeding.[55]

It is likely that the District Court appeal will be by way of 're-hearing'.[56] This means that the District Court will rely mostly on the evidence already presented in the Tribunal (rather than hearing new evidence), and will only differ from the *factual* findings of the Tribunal if:

- There was insufficient evidence to support the Tribunal's conclusions; or
- The Tribunal was plainly wrong in the conclusion it reached.

The District Court may also overturn the decisions that the Tribunal makes interpreting the *law*.

The District Court may make any orders that the Tribunal could have made, order a rehearing in the Tribunal, or reject the appeal.[57] The use of the phrase 're-hearing' in the RTA is confusing. It means that the District Court may order the Tribunal to hear the proceedings 'de novo' – as if there had been no hearing before, where all of the evidence is heard again. Obviously, someone seeking a high-profile case would want to avoid a Tribunal re-hearing. Tribunal re-hearings will happen when a substantial wrong or miscarriage of justice has or may have occurred or is likely to occur.[58] If that threshold is not met, the District Court is more likely to deal with the case itself.

The best way to avoid a re-hearing in the Tribunal will be to ensure that the best procedure possible is followed in the Tribunal, and all evidence that is relevant is called. That way, the risk of a substantial wrong or miscarriage of justice is lowered, and the District Court will be best equipped to hear the case on the evidence that has already been presented.

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[55] Rule 1.3.1 District Courts Rules 2009.
[56] *Housing New Zealand Corporation v Salt* DC Auckland CIV-2007-004-002875, 9 May 2008; also see *Harris v Christchurch City Council* DC Christchurch CIV-2008-009-002714, 28 July 2009 at [6]
[57] S 118 Residential Tenancies Act 1986.
[58] *Hobsonville Realty Ltd v Amosa* DC Waitakere CIV-2008-090-002567, 9 February 2009.

An appeal to the High Court must be lodged within 20 working days of a District Court decision.[59] The appeal may be on particular questions or may be a re-hearing of the case. There are no strict time limits on when the High Court will hear or determine the appeal, although again the High Court will attempt to secure the just, speedy, and inexpensive determination of any proceeding.[60]

The Tribunal may also refer questions directly to the High Court. These can be questions about the jurisdiction of the Tribunal or questions of law arising before the Tribunal.[61] This would be an ideal forum for a test case, but this power will only be used very rarely.

High Court decisions can be appealed to the Court of Appeal.[62]

[59] Rule 20.4 High Court Rules.
[60] Rule 1.2 High Court Rules.
[61] S 103 Residential Tenancies Act 1986.
[62] S 120 Residential Tenancies Act 1986.

3. Health Act 1956: Unhealthy Housing as a Crime and the Responsibility of Local Authorities

The 'Buildings' sub-Part of the Health Act (HA) gives City Councils and other Local Authorities certain responsibilities for housing standards. While these bodies are the focus of the HA, the HA also places some 'requirements' on landlords. As we know, section 45(1)(c) imports these requirements into the scheme of the RTA.

This section of the report looks first at some of the duties of Local Authorities under the HA. The discussion after that is about how the HA's requirements on landlords and tenants transfer through to the RTA and the jurisdiction of the Tenancy Tribunal.

3.1. Powers and Duties of Local Authorities

3.1.1. Jurisdiction of Local Authorities

Section 23 HA empowers and directs Local Authorities to improve, promote and protect public health in their district. Section 23 gives Local Authorities several powers / responsibilities, including:

1. *To make bylaws* under and for the purposes of the HA or any other Act that authorises the making of bylaws for the protection of public health;[63]
2. *To enforce* all HA regulations currently in force within the Local Authority's district, subject to the direction of the Director-General; and
3. *To appoint* Environmental Health Officers and other staff to discharge its duties under the HA.

The purposes of the HA are not explicitly stated within the HA (this is only a common feature in more modern legislation). So, in the absence of an explicit meaning, two purposes from section 23's context inform what 'purposes of the HA' most likely count towards the making of bylaws:

- the purpose of carrying out individual sections in the Local Authorities Part of the HA, like sections 41 and 42 discussed below; and

[63] This power is expanded on in sections 64 and 65 Health Act 1956.

- the purpose of the section: for Local Authorities to improve, promote and protect public health.

The meaning of 'subject to the direction of the Director-General' is unclear.

The Local Authority's power to make bylaws is restricted when it comes to buildings. A Local Authority may not make bylaws that purport to have the effect of requiring any building to achieve performance criteria additional to or more restrictive than those specified in the Building Act 2004 or the Building Code.[64] It is unclear how widely this restriction applies, but it does make it likely that Local Authorities *cannot make bylaws increasing the quality of residential buildings.* This may be the particular legal reason why Local Authorities have resolved to ask Parliament to legislate a Rental Warrant of Fitness for their districts, rather than creating a Rental Warrant of Fitness through bylaws.[65]

This means that Local Authorities have the power and responsibility to:

1. create bylaws to carry out particular sections in the HA, or to improve, promote and protect public health, but probably without raising the standards required of buildings;
2. enforce any bylaws or regulations that the LA or central government have created that are in force in the LA's district; and
3. appoint staff to carry out these duties.

Section 23 also gives LAs the responsibility to uphold the Housing Improvement Regulations 1947 within their district. This is a very important feature of section 23, and carries through in section 42 discussed below.

3.1.2. Powers and Duties relating to Housing

Local Authorities can order cleansing, repairs, or both.

3.1.2.a. Cleansing

Local Authorities may require an owner or occupier to cleanse premises where cleansing is necessary for preventing danger to health or for rendering the premises fit

[64] S 65A Health Act 1956.
[65] Both Wellington and Dunedin City Councils announced this intention in mid-2013.

for occupation.[66] Presumably, the Local Authority's choice of whether to order the owner or the occupier would turn on who had caused the lack of cleanliness. It may also be important to assess whom out of the occupier or owner has the means to cleanse the premises.

Local Authorities will need to factor in all aspects of a housing situation when forming its opinion about the necessity of cleansing. If the tenants are particularly vulnerable: babies, the elderly, people with physical or mental health conditions, then this is an important part of the context for the Local Authority in determining whether cleansing is necessary.

The cleansing power corresponds to the landlord's duty in the RTA to provide the premises in a reasonable state of cleanliness, and the tenant's duty to maintain the premises in a reasonable state of cleanliness.

From a housing-standards perspective, the benefit of this section of the Health Act (HA) is that, if a latent feature of the premises causes the 'need for cleansing', then this fault may be attributable to the owner, even though the particular 'need for cleansing' arises during the tenancy. For instance, mould might necessitate a cleansing order, but if a tenant could show that the mould was a result of a structural feature of the house, then it would be more proper for the Local Authority to order the owner to carry out (and pay for) the cleansing. This section may offer more insight into the causes of the 'need for cleansing' than under the RTA.

The only 'requirement' created by the cleansing section is that anyone who is ordered to cleanse a property must do so. Maintaining the cleanliness of the premises is not a requirement under this section of the HA. This means that this section of the HA cannot be used effectively in the Tenancy Tribunal.

[66] S 41 Health Act 1956.

Mere's Story

Rather than going to the Tenancy Tribunal, Mere could always have gone to her Local Authority instead. She could also go to the Local Authority if the Tribunal did not make an order to improve the quality of the house, but just ordered compensation.

For instance, the mould in the bedrooms and bathroom could be dealt with by a 'cleansing order' made by one of the Environmental Health Officers (EHO) for her Local Authority. The only difference is that she would need to show that the level of mould and mildew was dangerous to health.

Fortunately, Mere doesn't need to show that she is already sick from the mould spores: she just needs to persuade the EHO that the mould and mildew poses a present danger to her health. The Tenants Protection Association has access to a lot of research and resources to help Mere make the link between the mould and the danger to her health.

There is extra mould that has grown while Mere has been in the house, even though she has done everything reasonable to stop it. She has even been running a dehumidifier. Mere feels that her landlord should help her to cleanse the property of this mould too, as it seems to be part and parcel of living in the propriety. She may be able to get a cleansing order from the Local Authority to help with this mould too.

Mere's story continues with more options on page 41.

3.1.2.b. Repairs

Local Authorities may require owners to repair premises.[67] Where a house, by reason of its situation or insanitary condition, is likely to cause injury to the health of any persons therein, or is otherwise unfit for human habitation, a Local Authority may require the owner to carry out any repairs, alterations, or other work.

[67] S 42 Health Act 1956.

As with cleansing orders, Local Authorities will need to factor in all aspects of a housing situation when forming its opinion about the likelihood that the house is likely to cause injury to the health of any people living in it. In particular, if the tenants are particularly vulnerable: babies, the elderly, people with physical or mental health conditions, then this is an important part of the context for the LA in determining whether there is a danger to health and whether repairs ought to be ordered.

Local Authorities may require an owner to repair a 'dwellinghouse' where the house is in breach of the Housing Improvement Regulations. This means that if a property is in breach of the Housing Improvement Regulations, a Local Authority may require a landlord to repair, alter or do other work to the premises.

If an owner doesn't comply when the Local Authority requires them to repair the house, the LA may order the house to close until the work is done. This is a significant drawback for tenants considering seeking a repair order from the LA. A further drawback for tenants is that it is an offence to occupy, or permit the occupation of premises that are subject to a closing order.[68] Owners or occupiers may appeal closing orders in the District Court.[69]

The threat of a closing order places significant but different pressures on landlords and tenants. Landlords face losing revenue until they bring their property up to standard. This means that closing orders ought to be a powerful mechanism to require landlords to bring their property to a state of repair where the property no longer poses a risk to the health of occupants. Tenants face losing their home and face a new set of letting fees and a new lease, as well as potentially needing to bring Tenancy Tribunal proceedings to end the lease. In the face of these difficulties, it is hard to see why a tenant would report the poor quality of their housing to a Local Authority.

In this way, the Health Act system discourages tenants from reporting health and safety problems in their home and asks them to weigh their health against their security of tenure. This is an unacceptable position in a developed nation, and directly contradicts New Zealand's commitment to the Right to Housing.

[68] S 47 Health Act 1957.
[69] S 43 Health Act 1957.

These disincentives for tenants to report have the further effect of rendering the HA buildings scheme ineffective. Tenants, who are in the best position to report when their health is threatened by their housing, are strongly disincentivised from doing so. An increasing proportion of New Zealanders live as tenants, and it is staggering that an Act intended to improve, promote and protect public health is fundamentally flawed in protecting such a large class of the public.

The wide discretion given to Local Authorities under the HA is also a weakness in the HA scheme, as so much of the policy creation and enforcement turns on the will of the particular Local Authority involved. If a particular Local Authority is inclined to see security of tenure for each tenant it works with as more important than the overall improvement of housing standards, then the Local Authority is very unlikely to use its powers under the HA. There is no clear legal argument why Local Authorities should not exercise their discretion in this fashion, but it is certainly unhelpful to housing standards, and to tenants in the big picture. Further, the reliance of the scheme on the 'opinion' of the Local Authority or its experts, without giving clear guidelines about how properties should be judged, does nothing for creating a clear and consistent standard.

Local Authorities probably do not have jurisdiction to rectify nuisances (described below),[70] except where the situation that constitutes a nuisance also activates the Local Authority's powers to order cleansing or repairs.

[70] Compare the original s 42 Health Act 1956 with s 42 as it now stands. Because this power used to be there but is not there anymore, it is safe to assume that Parliament intended to remove that power from Local Authorities.

Mere's Story

Instead of going to the Tenancy Tribunal about the leaking cracks around her windows, Mere could also asked her Local Authority to order their repair. She would need to persuade them that the leaking was likely to injure her health. The Tenants Protection Agency may be able to help her make the link between leaking, dampness and her health.

The Local Authority will probably try to work with Mere's landlord to repair the cracking and make the house healthy again. However, it may take a long time to work through the Local Authority processes, and if the landlord doesn't comply, then Mere may have gained nothing: the Local Authority's range of powers are much more limited than the Tribunal's. This would mean that her landlord lost rent for a period, but means that Mere would lose her home.

Mere's story continues with more options on page 44.

3.2. The Health Act and the District Court

The Health Act identifies several housing conditions as 'nuisances.'[71] Creating a nuisance or allowing a nuisance to arise or continue is an offence under the Health Act. These offences can be prosecuted in the District Court.[72]

Nuisances include situations where:

- any accumulation or deposit is in such a state or is so situated as to be offensive or likely to be injurious to health;
- any premises, including any accumulation or deposit thereon, are in such a state as to harbour or to be likely to harbour rats or other vermin;
- any premises are so situated, or ... are in such a state, as to be offensive or likely

[71] S 29 Health Act 1956.
[72] Ss 30, 33 Health Act 1956.

to be injurious to health;[73]

- any building or part of a building is so overcrowded as to be likely to be injurious to the health of the occupants, or does not, as regards air space, floor space, lighting, or ventilation, conform with the requirements of this or any other Act, or of any regulation or bylaw under this or any other Act:[74]
- any animal, or any carcass or part of a carcass, is so kept or allowed to remain as to be offensive or likely to be injurious to health:
- any yard, premises or land is in such a state as to be offensive or likely to be injurious to health:
- there exists on any land or premises any condition giving rise or capable of giving rise to the breeding of flies or mosquitoes or suitable for the breeding of other insects, or of mites or ticks, which are capable of causing or transmitting disease.

It is not just an offence to act to create a nuisance. It is also an offence to cause a nuisance by omitting to act. Further, it is an offence to suffer a nuisance to continue. The 'sufferance' offence means that, even if a tenant created a nuisance, a landlord commits an offence by allowing it continue when they have the power to stop it. This was discussed by the High Court in *Garden City Developments Ltd v Christchurch City Council.*[75]

Several groups seem to be under the misapprehension that only the Ministry of Health can prosecute people for nuisances under the Health Act. This is not true. As a general rule, anyone may bring a proceeding.[76] There is nothing that rebuts this general rule. Nothing in the Criminal Procedure Act, nothing in the list of offences that the Attorney-General has to consent to prosecution for,[77] nothing in the Health Act, Building Act or Residential Tenancies Act. Even where the Ministry of Health and the Director of Public

[73] For this nuisance in particular, tenants will need evidence showing the causal link between the particular housing condition complained of and a likely effect on the tenants' health.
[74] Significantly, this 'nuisance' imports large portions of the Housing Improvement Regulations into the definition of a 'nuisance.'
[75] *Garden City Developments Ltd v Christchurch City Council* HC Christchurch, 29 July 1992.
[76] S 15 Criminal Procedure Act 2011
[77] S 24 Criminal Procedure Act 2011, http://www.crownlaw.govt.nz/uploads/statutory_offences_2013.pdf at 2 September 2013.

Health are given powers to uphold the Act, this explicitly does not exclude the power of other people to do so.[78] This means that anyone who has good cause to suspect[79] that a landlord has breached the nuisance provisions of the Health Act may bring proceedings against the landlord in the District Court.

It is very significant that anyone can prosecute under the Health Act (HA). This may mean that wherever there are breaches of the RTA standards (including the HA, Housing Improvement Regulations (HIR) and Building Act (BA) standards) that are also a nuisance under the HA, the whole case can be heard in the District Court. This gives the case more publicity, and is a significant step towards creating better precedents and more certainty in this very uncertain area of law. There are three steps to achieve this:

- Bring a Health Act prosecution in the District Court;
- File in the Tenancy Tribunal for breaches of the RTA, BA, HIRs or HA; and then
- Apply to the Tribunal to have those breaches heard alongside the Health Act prosecution in the District Court.[80]

To succeed on the third step, a party would have to argue that the Tribunal is unable to 'hear and determine' the HA matters, and the other breaches will be 'more properly determined' alongside the Health Act prosecution.[81] This is because combining the hearings would mean that all of the issues were before the one court at the one time, rather than split over two hearings.

The District Court has several powers in hearing HA applications:

- Require the owner and the occupier to abate the nuisance effectively;
- Prohibit the recurrence of the nuisance;
- Both require the abatement and prohibit the recurrence of the nuisance;

[78] Ss 3A, 3B Health Act 1956
[79] S 16 Criminal Procedure Act 2011
[80] The Tribunal can order this under s 83 RTA, which overrides the normal rule in s 82 that only the Tribunal can hear matters within its jurisdiction.
[81] S 83 Residential Tenancies Act 1986.

- Specify the works to be done in order to abate the nuisance or prevent its recurrence, and the time within which they shall be done; and/or
- If the Court is of opinion that by reason of the nuisance any dwelling or other building is unfit for human occupation, it may prohibit its use for human occupation until the nuisance has been effectively abated to the Court's satisfaction, or until provision has been made to the Court's satisfaction to prevent the recurrence of the nuisance.[82]
- If an offence has been committed, order the payment of a fine of up to $500, plus $50 per day for each day that the offence has continued.[83]

The wording of the first power is ambiguous as to whether the District Court can order just the landlord or just the tenant to act. However, the fourth power enables the District Court to be much more specific about what work is done. It is unlikely that the District Court would order a blameless tenant, or a tenant unable to conduct the necessary work, to be jointly responsible with the landlord for carrying out the work.

Mere's Story

Another option open to Mere is to take her landlord to the District Court, prosecuting him for an offence under the Health Act. This works if the property is likely to harm her health.

Mere may be able to prosecute her landlord for the effect that the mould will probably have on her health. While the state of her house is in front of the District Court, she may also want to take her landlord to the Tribunal to repair the leaking cracks around her windows, and ask the Tribunal to transfer that part of her case up to the District Court.

This means that Mere can raise the profile of housing issues like hers, and create legal precedent about housing that impacts on people's health.

Mere's story continues with more options on page 52.

[82] S 33 Health Act 1956.
[83] Ss 30, 136 Health Act 1956.

3.3. The Health Act and the Tenancy Tribunal

As discussed above, section 45(1)(c) RTA imports 'requirements' placed on landlords in any enactment into the Tribunal's jurisdiction.

The only requirements placed on landlords by the HA are to comply with the Local Authority orders. Non-compliance is an offence under the HA,[84] which will be able to be prosecuted in the District Court. It seems likely that Local Authorities whose orders are breached would prosecute for those breaches.

Section 45(1)(c) may make it possible to take a landlord to the Tribunal for breaches of the Local Authority's orders under the HA. This would means that the Tribunal could use its broad range of powers, including mediation, to uphold the requirements under the HA.

David Grinlinton, a residential tenancies expert at the University Auckland, argues that the nuisances in the HA also give rise to 'requirements' that are imported into the RTA by section 45(1)(c).[85] Whether this is the case turns on how broad an interpretation is put on the word 'requirements'. Section 29 (discussed above) names several situations which, when created, are 'nuisances.' Section 30 provides that creating (by action or inaction), or suffering a nuisance to continue, is an offence. Section 31 suggests that the nuisances scheme operates independently of other rights, remedies and proceedings. Section 33 is the first place in the nuisances scheme that uses the word 'requirement,' and it is used similarly to the Local Authority-enforced parts of the HA: the District Court may *require* a party to abate a nuisance.

A narrow reading of the word 'requirements' would mean that the only 'requirements' imported into the RTA are again the requirements that the DC is able to impose. The DC already has adequate mechanisms to enforce these. A broader reading of the word 'requirements' would see nuisances included within the scope of section 45(1)(c), but the narrower reading is more likely. This uncertainty would be a good place for a tenant or a tenants' advocacy group to run a test case: to determine whether the HA nuisances are requirements under section 45(1)(c) RTA.

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[84] S 47 Health Act 1956.
[85] D Grinlinton, *Residential Tenancies: The Law and Practice*, 4th ed. 2012

4. Housing Improvement Regulations 1947: Old but Measurable Housing Standards

Central government made the Housing Improvement Regulations (HIRs) as a legislative instrument under the Health Act.[86]

Legislative Instruments are subject to New Zealand's international legal obligations. As discussed above, Local Authorities are responsible for the enforcement of the HIRs within their districts.[87] LA's are also responsible for interpreting some of the provisions in the HIRs. The Ministry of Building, Innovation and Employment also has responsibility for upholding the HIRs.[88]

Section 45(1)(c) Residential Tenancies Act means that the requirements under the HIRs are brought within the Tenancy Tribunal's jurisdiction. This section includes summaries of several key Tribunal orders.

4.1. Still in Force?

Despite doubt expressed by some commentators[89] about whether the HIRs remain in force, the HIRs are still used in Tenancy Tribunal decisions[90] and in the leading text on residential tenancies.[91] The suggestion that the HIRs may have been 'impliedly repealed' by the passage of the Building Act 2004 does not fit with the very different purposes and uses of the two enactments. It is safe to continue using the HIRs as good and current law.

4.2. Responsibility shared

The HIRs create standards that housing must meet. Many of these standards fall automatically to the landlord. However, it is unclear whether some standards are the

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[86] The Housing Improvement Regulations 1947 were made under the Housing Improvement Act 1945. Pursuant to s 7(2) Health Amendment Act 1979, they continue in force as if they had been made under s 120C Health Act 1956.
[87] Section 23 Health Act.
[88] Section 124 Residential Tenancies Act 1986.
[89] Sarah Bierre "Unaffordable and Unhealthy" in *Homes People Can Afford* (Steele Roberts 2013) 42
[90] See below.
[91] D Grinlinton, *Residential Tenancies: The Law and Practice*, 4th ed. 2012

responsibility of the landlord or tenant. In the absence of clear direction, the Tribunal has treated those standards as a responsibility shared by landlord and tenant.[92]

4.3. Standard

This section of the report has several of the most important regulations in the HIRs in note form. Where standards use the words 'adequate' or 'approved', it is for Local Authorities to exercise their discretion as to what is allowed within their districts.

Regulation 6 requires that every living room shall be fitted with a fireplace and chimney or other approved source of heating. It is for local authorities to do the 'approving.' The Christchurch City Council (CCC), like other City Councils, has not published what it will "approve", suggesting that the CCC may be unaware of its responsibility under this rule. The CCC's common practice is to approve a wall socket as a source of heating. A tenant or a tenant's advocacy group would do well to challenge this practice.

Regulation 7 is about facilities for food preparation.

Regulation 8 requires that bedrooms have a floor area of at least $6m^{2.}$

Regulation 11 requires adequate natural lighting for bedrooms and living rooms. The window area must be at least 10% of the floor area and openable windows must comprise at least 5% of the floor area – the 10% : 5% rule.

Regulation 12 requires that staircases provide safe access between stories, including a sufficient handrail.

Regulation 14 requires that any house built on land that is not adequately drained or is subject to flooding during times of normal rain shall not be occupied.

Regulation 15 requires that every house shall be free from dampness. Responsibility for this rule is shared between landlord and tenant.

Regulation 16 deals with the disposal of waste water and sewerage.

Regulation 17 is about floors, walls and ceilings. Houses shall be weatherproof. Every floor shall have a washable and durable surface, and shall be kept in a good state of

[92] See 4.5 and 4.5.2 of this report.

repair free from crevices, holes and depressions. All walls and ceilings shall be sheathed, plastered, rendered or otherwise treated, and shall be maintained to the satisfaction of the local authority.

Regulations 19 and 20 are about overcrowding in houses.

4.4. Enforceability

There are several ways to enforce the Housing Improvement Regulations:

- In the Tribunal, as discussed below;[93]
- By notifying the Local Authority, as discussed above;[94]
- For rules affecting air space, floor space, lighting or ventilation, by taking the landlord to the District Court under the nuisance provisions in the Health Act, as discussed above;[95]
- For any situation where the HIRs coincide with a nuisance under the Health Act, including posing a risk to health, by taking the landlord to the District Court under the nuisance provisions in the Health Act, as discussed above.[96]

4.5. Examples of Tenancy Tribunal Decisions: Understanding the Regulations

4.5.1. Dixon v Barfoot & Thompson[97]

In these Tribunal proceedings, the tenant sought compensation from the landlord for damage caused by dampness, mould and mildew (regulation 15). The dampness, mould and mildew were caused mostly by condensation, which affected most houses in the region.

The tenant had done everything reasonable to reduce condensation, including alerting the landlord, but these steps were not enough to make the house free from dampness. It is not clear from the summary what these steps were, making it difficult for other

[93] See 2.1.3 of this report.
[94] See 3.1 of this report.
[95] See 3.2 of this report.
[96] See 3.2 of this report.
[97] *Dixon v Barfoot & Thompson* TT 661/95 Henderson 15 February 1996.

tenants to know whether they are doing enough. Financial compensation was awarded to the tenant for the extent to which the problem was beyond their control. This is a good example of how the Tribunal can apportion responsibility between landlord and tenant.

A similar decision was reached in *Housing New Zealand Corporation v Ladbrook*.[98] The District Court upheld the Tribunal's reasoning to award compensation to a tenant of a damp, mouldy house. The landlord had argued unsuccessfully that the tenant's lifestyle was the cause of the damp and mould. To quote from part of the Tribunal Order that was upheld:

> In summary premises must be able to be used and lived in, in a normal way, without mould developing. If this can't be done then it is the landlord's problem. If the tenants fail to ventilate and heat the premises when heating and ventilation are available, then it is the tenant's problem.

The District Court also held that expert evidence does not bind the Tribunal's decision. The Tribunal can disagree with expert evidence, and must exercise its own judgment regardless of the presence of expert evidence.

A key point to remember from this Order: When a tenant has acted reasonably to keep a property dry, the landlord is responsible for remaining dampness.

4.5.2. Collins v Property South[99]

In these Tribunal proceedings, the landlord had taken no action for six months to fix a hole in the floor (regulation 17) and a problem stopping the fireplace from being used (regulation 6). The landlord had taken some steps to fix a vermin problem (section 29(c) Health Act) but had not succeeded, and had failed after four months to fix a leak leading to dampness in the house (regulation 15).

The Tribunal affirmed that section 45(1)(c) imported the HIRs into the Tribunal's jurisdiction.[100] It also commented that the vermin problem was a breach of the Health

[98] *Housing New Zealand Corporation v Ladbrook* [2010] DCR 102
[99] *Collins v Property South* TT Invercargill 00/00359/IN 14 May 2009

Act. The Tribunal then made the confused statement that vermin problems caused by the tenant had to be resolved by the tenant, while problems that were present at the start of the tenancy were the responsibility of the landlord. This type of binary thinking is unhelpful, and does not accurately reflect the law. There are two main reasons for this. First, it does not account for problems that have arisen during the tenancy but cannot be attributed to the tenant. Second, it doesn't account for the landlord's responsibilities for nuisances under the Health Act still binding the landlord, even if a problem was caused by a tenant, as discussed above.[101] The responsibility-sharing model in *Dixon* is a better tool for the Tribunal to use again in future.

The Tribunal made another definite statement of principle: that where a landlord fails to attend to their responsibilities within a reasonable time, and a tenant suffers loss, then the landlord is required to compensate the tenant for actual loss suffered. While this principle does not set a precedent for future Tribunal proceedings, it will still be helpful to suggest it to the Tribunal in future.

In fixing the compensation for the delay, the Tribunal was mindful of the tenants' contribution to the delay, in particular their poor communication.

A key point to remember from this Order: Where a landlord fails to fulfil their responsibilities within a reasonable time and a tenant suffers loss, the landlord should compensate the tenant for actual loss suffered.

4.5.3. Guerrero v Short[102]

In these proceedings, a tenant had leased a property advertised as a three bedroom flat. However, due to the lack of ventilation and light (regulation 11) and consequent levels of moisture (regulation 15), it only had two legal bedrooms. The Tribunal reduced the rent to the market level for a two bedroom flat for the duration of the tenancy. This is one of many cases where the Tribunal's reasoning would be very helpful reading, if more than a summary of that reasoning was available.

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[100] Paragraph eight of *Collins v Property South* TT Invercargill 00/00359/IN 14 May 2009.
[101] See discussion at 3.2.
[102] *Guerrero v Short* Auckland TT 2656/02 13 December 2002

Similar reasoning was applied in *McKinnon v Housing New Zealand*,[103] where the third bedroom was too small to count as a bedroom (regulation 8) and in *A.U. Investments Ltd v Skeet*[104] where the ventilation and light in the third bedroom were inadequate for it to be a bedroom (regulation 11 - the 10% : 5% rule.). In both cases, the Tribunal reduced the weekly rent to the market rent for a two-bedroom place.[105]

> *A key point to remember from these Orders:* Landlords should only advertise a property to the extent that it satisfies housing standards. If they advertise it beyond what it can provide, a rent reduction is appropriate.

4.5.4. Sunde, Peart & O'Donnell v Cho[106]

These proceedings were about a leaky home (regulation 17). The structural faults of the house led to moisture ingress (regulation 15) and an adverse impact on the tenants. The Tribunal considered four facts relevant:

1. There was confirmed mould and a high moisture level in certain areas of the property.
2. The landlord had failed to take action when advised of the problem.
3. The higher than acceptable moisture levels in the dwelling could potentially have an adverse effect on the health of the occupants.
4. There was a negative impact on the tenant's use and enjoyment of the premises.

It is notable that both health and use and enjoyment were relevant factors in compensation. It is unclear from the summary available what the end sum of compensation was.

When determining how much compensation to award, the Tribunal scaled the award against the seriousness of using its maximum financial jurisdiction (then $12,000, now $50,000). This is wrong for two reasons. First, compensation is about making up for

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[103] *McKinnon v Housing New Zealand* TT 1920/96 Christchurch 9 October 1996.
[104] *A.U. Investments Ltd v Skeet* TT 335/97 Christchurch 25 March 1997.
[105] In *McKinnon*, the room that was too small to be a bedroom was counted as an 'additional living space' for the purpose of calculating the market rent. The reason that this didn't also happen in *Guerrero v Short* is because the ventilation and light requirements apply equally to bedrooms and living rooms, so also disqualified the room from counting as a living room.
[106] *Sunde, Peart & O'Donnell v Cho* North Shore, 09/01145, TA & 09/01449/TA, 25.11.09.

harm suffered: the maximum limit is not relevant to determining this. Second, if the harm suffered exceeds the Tribunal's jurisdiction, then the matter can be heard by the District Court: there is a jurisdictional divide between the Tribunal and the Court, but this should not be a jurisdictional ceiling. The RTA specifically contemplates these cases, so suggesting that the divide should act as a ceiling is incorrect.

A key point to remember from this Order: A property's effect on a tenant's health and its effect on their use and enjoyment of the premises are both relevant to setting levels of compensation.

Mere's Story

The condition of Mere's home breaches several of the Housing Improvement Regulations:

- The leaking cracks around the windows show that the property is not weatherproof, which breaches regulation 17.
- The mould and mildew show that the property is not free from dampness, which breaches regulation 15.

Mere is living reasonably in the house, including running a dehumidifier and regularly opening her windows. Mere is doing her bit, and her landlord needs to do his bit too. The rest of the responsibility for keeping the property dry falls to him.

This may mean that the landlord needs to change the features, structure or design of the house to ensure that the dampness does not continue. This may mean installing an extractor fan, improving the heating in the property, or installing damp-proof coursing.

Mere should refer to these regulations when she talks with her landlord, and should certainly refer to the regulations when she is arguing her case in the Tenancy Tribunal or District Court.

Mere's story continues with more options on page 60.

5. Building Act 2004: Two Tools to Raise Housing Standards

The Building Act offers two potentially helpful tools to tenants trying to boost the quality of their housing. The first tool is the 'Building Code', which sets minimum standards for all building work. The second tool is the separate scheme in the Building Act for buildings that are dangerous or insanitary. Unfortunately, both tools are blunted by their inability to protect tenants or incentivise them to report the condition of their property.

5.1. Building Code

The Building Act 2004 (BA) creates and governs the Building Code (the Code) and the documents that support it.[107] The Code applies to all building work.[108] There are only limited circumstances where existing buildings have to be brought partially or fully in line with the current Code. [109]

One situation where an existing building may have to update to meet the current Code is where an owner proposes to change the use of a non-residential building to include a household unit (say, changing an office block to be a block of flats). An owner can only do this with written notice from the Local Authority.[110] The Local Authority will only grant written notice where it is satisfied, on reasonable grounds, that the building, in its new use, will comply, as nearly as is reasonably practicable, with the building code in all respects.

A second situation where existing buildings have to come up to the current Code to some extent is where alterations are made to them. It is an attractive argument that by forcing some repairs to happen under the RTA, a landlord could be forced to then bring parts of their property up to full Code compliance under the BA. Unfortunately, given the way that the BA is structured, this is unlikely to be a worthwhile approach in practice. See the reasoning in Appendix Two for more details.

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[107] See the NZ Building Code Handbook for a clear explanation of how the Building Code fits with the many documents that bring it into practice: As at 4 September 2013, available at http://www.dbh.govt.nz/UserFiles/File/Publications/Building/Compliance-documents/building-code-handbook-amendment-12.pdf.
[108] S 17 Building Act 2004.
[109] See sections 112 – 116A Building Act 2004.
[110] S 115 Building Act 2004.

If it seems that the alterations carried out don't comply with Code, or that the building does not meet the Code's standards for escape from fire, then there are several steps available under the BA:

- Investigate further: the NZ Building Code Handbook provides a useful guide to determining whether the Code has been breached.[111] It explains the system of objectives, functional requirements and performance criteria within the Code, as well as explaining the Regulations, compliance documents and other documents that sit outside the Code and help to interpret the Code in more practical terms.

- Contact a builder, who, with the consent of the owner can inspect a building and notify the Local Authority if he or she is of the view that the building work carried out under a consent is in breach of code.[112]

- Notify the Local Authority, who should exercise their right to inspect the premises.[113] If the owner resists this, then the Local Authority can seek a license to enter for inspection from the District Court.[114]

Once a building has come to the attention of the Local Authority, they may issue an infringement notice,[115] take infringement proceedings against an owner in the District Court,[116] or issue a notice to fix.[117] It is an offence to breach a notice to fix.[118] Local Authorities must keep a publicly available record for ten years summarising all complaints made about a building and how the Local Authority dealt with the complaint.[119]

A separate path to force compliance with the 'alteration' requirements or the 'change of use' requirements is to bring a Tribunal proceeding under section 45(1)(c), as discussed

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[111] Available from the Ministry of Business, Innovation and Employment website. As at 4 September 2013, available at http://www.dbh.govt.nz/UserFiles/File/Publications/Building/Compliance-documents/building-code-handbook-amendment-12.pdf.
[112] S 89 Building Act 2004.
[113] S 222 Building Act 2004.
[114] S 227 Building Act 2004.
[115] S 372 Building Act 2004.
[116] S 371 Building Act 2004.
[117] S 164 Building Act 2004.
[118] S 168 Building Act 2004
[119] S 216 Building Act 2004.

above. This is because all building work *must* comply with the Code to the extent provided for in the BA, which is obviously a 'requirement.'[120]

5.2. Dangerous and Insanitary Buildings

The BA applies differently to certain categories of buildings. Among these categories are buildings that are dangerous or insanitary. If a building is dangerous or insanitary, this leads to certain offences under the BA, as well as giving Local Authorities special powers to deal with that building.

5.2.1. When is a building Dangerous or Insanitary?

A dangerous building is one that is:

- likely to cause injury or death to a person or damage to other property in the normal course of events; or
- a building where in the event of a fire, injury or death is likely.[121]

The former might include a rotted deck or a lack of hand-rails between a ledge and a fall.[122] The word 'dangerous' should be given a 'fair, large and liberal' interpretation.[123] The person arguing that the danger is 'likely' must satisfy the Court that the danger "could well happen": this is more than showing that the danger is possible, but doesn't mean having to show that it is more likely than not.[124]

An insanitary building is one that:

a) is offensive or likely to be injurious to health because—

i. of how it is situated or constructed; or

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[120] s 17 Building Act 2004.
[121] S 121 Building Act 2004.
[122] Given as examples in *Whether the special provisions for dangerous, earthquake-prone, and insanitary buildings in Subpart 6 of the Building Act that refer to a building can also be applied to part of a building* Determination 2012/043, J Gardiner.
[123] *Hyslop v Dunedin CC* HC Dunedin AP35/93, 21/6/1993. Applied under Building Act 2004 in *Thames-Coromandel District Council v Fawcett* DC Hamilton CIV-2008-019-655, 16/12/2008.
[124] *Weldon Properties Ltd v Auckland City Council* HC Auckland, 21/8/1997. Applied under Building Act 2004 in *Thames-Coromandel District Council v Fawcett* DC Hamilton CIV-2008-019-655, 16/12/2008.

ii. it is in a state of disrepair; or

b) has insufficient or defective provisions against moisture penetration so as to cause dampness in the building or in any adjoining building; or

c) does not have a supply of potable water that is adequate for its intended use; or

d) does not have sanitary facilities that are adequate for its intended use.[125]

The definition of 'insanitary' is broad enough that any arguments can be based on where the building is, how it is designed, or what condition it is in. This probably operates as a catch-all for anything to do with a building.

Several 'Determinations'[126] by the Department of Building and Housing (DBH), now MBIE, are helpful when analysing whether a building is dangerous or insanitary. Particular principles arising from some Determinations and court cases are:

- Even where underfloor rot may show the presence of a leak and a possibility of floor collapse, the main question under sections 121 and 123 is still whether that situation is likely to cause danger or be injurious to health.[127]

- Even where small and specific leaks had lead to small patches of toxic mould, the Local Authority was not wrong to have not found the building in question to be insanitary. An important part of the context for this decision was that the Local Authority had made other orders that would respond to the leak and mould problem.[128]

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[125] S 123 Building Act 2004

[126] A determination is a binding decision made by the MBIE. Seeking a determination is one way of solving disputes or answering questions relating to the Building Code and territorial authority/building consent authority/regional authority decisions under the Building Act. It is similar to an order of the Tenancy Tribunal.

[127] *The issuing of a notice to fix concerning dangerous and insanitary aspects of a motel unit at 407 Great South Road, Papakura, Auckland* Determination 2008/98, J Gardiner.

[128] *The code compliance of a 15 year old house at 154 Rangihaeata Road, Takaka, Golben Bay* Determination 2009/15, J. Gardiner.

- The onus is on the person who says that a building is insanitary to show that this is the case.[129]
- Only part of a building needs to be insanitary or dangerous for a Local Authority to be able to act.[130]

The first two principles are questionable. In those Determinations, the DBH seems to have reasoned that a building must be damp *and* insanitary for the insanitariness test to be met. However, this is not how the Building Act is written.

The Building Act requires the DBH (now MBIE) to ask:

1. Is there dampness in the building?
2. Was the dampness caused by insufficient or defective provisions against moisture penetration?

If so, then the building is insanitary under the Building Act. There is no third question where MBIE may exercise discretion as to whether it thinks the moisture is insanitary. If the DBH adds that extra layer, then it is mis-applying the law as it is written.

This two-step reasoning will lead to a higher building standard, but it can be understood as erring on the side of public health over a property owner's economic interest. It is also more consistent with the weather-tightness provisions in the Housing Improvement Regulations (regulation 17).

5.2.2. Enforcement: Dangerous or Insanitary Rental Homes

If a building is insanitary or dangerous, then owners and occupiers may be liable for various offences under the BA.[131] Further, the Local Authority will have various powers to deal with the building.

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[129] *Marlborough District Council v Chayton* [1995] DCR 382
[130] *Whether the special provisions for dangerous, earthquake-prone, and insanitary buildings in Subpart 6 of the Building Act that refer to a building can also be applied to part of a building* Determination 2012/43, J. Gardiner, and *The issuing of a notice to fix to a body corporate for a multi-storey commercial and residential unit-titled building at 2 Queen Street, Auckland* Determination 2011/068, J. Gardiner.
[131] S 116B Building Act 2004.

5.2.2.a. Offences

It is an offence to use a building that is not safe or not sanitary. It is also an offence to knowingly permit another person to use the building. Commentary suggests that the 'not safe' or 'not sanitary' standard is likely to be the same as the definitions of 'dangerous' or 'insanitary.'[132] It is likely that the 'use' offence only applies to occupiers and the 'knowingly permit' offence only applies to landlords.

A person who commits one of these offences is liable for a fine up to $100,000, plus a further $10,000 per day for every day or part day that the offence has continued. The offences apply to commercial as well as residential premises, so it may well be that the upper fines are intended for offending on a very large, perhaps more commercial, scale.

A significant disadvantage of this offence regime is that it will be very hard to use against a landlord without equally affecting the tenant. When an offence has been successfully prosecuted, judges may still sentence an offender to a discharge without conviction. This may mean that tenants who had no knowledge about the illegality of their home, or who had no options to live elsewhere are able to avoid conviction, even if they have committed an offence under the BA. All the same, the process will be onerous and unpleasant for them.

5.2.2.b. Local Authorities' Role

Local Authorities have various powers to deal with a building that it has determined is dangerous or insanitary.[133] These include fencing the property off, issuing a notice requiring a reduction of the level of danger and ordering the demolition of the property. The Building Act sets out a process that Local Authorities must follow, which usually involves consultation with building owners.[134] Local Authorities may apply to the DC for a warrant to enter a property and fix it themselves if landlords refuse to do so when given notice. Local Authorities can act more rapidly where there is immediate danger to people or to their health.[135]

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[132] *Building Law in New Zealand* (online looseleaf ed, Brookers), at BL116B.02.
[133] S 124 Building Act 2004
[134] Ss 124 – 128 Building Act 2004
[135] S 129 Building Act 2004

The nature of the Local Authority's powers is such that a tenant will probably lose access to their home if the powers are exercised. This, along with the offences just discussed, is obviously a strong disincentive to tenants and to Local Authorities to seek or to use the powers under this section.

Local Authorities must adopt a policy on dangerous, earthquake-prone and insanitary buildings.[136] The policy must state the approach that the Local Authority will take in performing its powers and procedures regarding those building types, the Local Authority's priorities in exercising its powers and procedures, and how the policy will apply to heritage buildings. The policy is a 'legislative instrument': its purpose is to apply the BA, not to extend it. This is why Local Authorities may not use their power to create a policy to try to raise the standards required under the BA.[137]

Section 45(1)(c) of the RTA finds little use in the BA scheme around dangerous and insanitary buildings, as there are scarce few 'requirements' created in this part of the BA. There do not seem to be any ways that a tenant can use section 45(1)(c) in conjunction with this part of the BA to helpfully bring their case in the Tribunal. The reverse approach of bringing a BA prosecution and tacking a Tribunal proceeding to it (as discussed under the HA above) is also unlikely to be helpful here. This is because under the BA offences system, a tenant is an offender whenever their landlord is one. For this reason, a tenant is unlikely to want to bring their landlord's offending to the notice of the District Court, especially when the HA offers a more attractive route.

5.3. Conclusion

The Building Act does not offer most tenants the kind of protection available under the Health Act or the Residential Tenancies Act. Its only real suitability is as a crude tool to force work on houses that are so far short of the standards that they are already causing danger to a tenant or their health. Most tenants are unlikely to use this tool, because of the threat it poses to their tenancy and the dual illegality of owning or living in a house that is in breach of the BA standards for insanitariness and danger.

[136] S 131 Building Act 2004
[137] *Insurance Council of New Zealand v Christchurch City Council* [2013] NZHC 51

Mere's Story

Mere may be able to show that her house is an insanitary building. She could argue that the leaking cracks around her windows show that her home is in a state of disrepair that is likely to harm her health, but her stronger argument will simply be that the leaking shows that the provisions against moisture penetration are defective. The damage to her belongings show that dampness has resulted from this moisture penetration.

This means that Mere can take her landlord to the Ministry of Business, Innovation and Employment or to her Local Authority.

Unfortunately, neither of these options were designed with Mere in mind. Although the problems with her house are not her fault, Mere has committed as much of an offence by living in an insanitary home as her landlord has done by renting it to her. It will be a hard process for her to ensure that her landlord is prosecuted without her being found guilty too.

Likewise, although her Local Authority has the power to deal with her insanitary home, its powers are very limited and may involve her having to move out. Her best hope is for the Local Authority to issue her landlord with a notice to repair the property, and then apply to the District Court for a warrant to repair the property if he refuses to do so.

6. Local Authority Bylaws: Untapped Potential

Local Authorities could or should have bylaws or policies:

- To interpret key provisions of the Housing Improvement Regulations;[138]
- To apply the Housing Improvement Regulations;[139] and
- To apply the Health Act and make its provisions as accessible as possible;[140]
- To apply the Building Act.
- In particular, the Building Act requires each Local Authority to have a policy on dangerous, earthquake-prone, and insanitary buildings within its district.[141]

Bylaws 'to apply' different pieces of legislation should give Local Authorities a series of very good opportunities to uphold tenants' right to housing. This includes ensuring that the Council system is clear and easy to use and ensuring tenants' security of tenure when they are faced with leaving their home.

Bylaws interpreting the Housing Improvement Regulations should be another significant opportunity for Local Authorities to ensure that housing standards are at an appropriate level. For instance, Local Authorities could decide to only 'approve' sources of heating that satisfied certain requirements around cost and efficiency. Local Authorities could decide not to approve non-flued gas heaters, a significant contributor to condensation in many properties. These types of measures are economically brave, but absolutely worthwhile for public health and social benefits.

Unfortunately many Local Authorities take a bare bones approach to Local Authorities' power to raise housing standards and make those housing standards more accessible. They only make the mandatory Building Act bylaw, ignoring their power to make others.

We have done further work on the adequacy of some Local Authority regulations, but will keep this work back for now so that we can work with the Local Authority involved.

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[138] See 4.3 of this report.
[139] See 4.3 of this report.
[140] See 3.1.1 of this report.
[141] S 131 Building Act 2004.

7. International Legal Context: Healthy Housing is a Human Right

New Zealand's international legal obligations affect the interpretation of our own (domestic) laws, and guide all arms of government. New Zealand has committed to the Right to Housing, impacting the laws discussed in this report and any government bodies who are responsible for housing.

7.1. New Zealand's obligations

New Zealand has signed and ratified the International Covenant on Economic, Social and Cultural Rights, [142] which includes the right to housing. The right to housing is best understood as a step towards a larger goal, the inherent human right to dignity. So, the right to housing is understood as 'aspirational.' This means that fulfilling the right to housing is not just about meeting minimum standards: it is about moving forwards towards a goal.

7.2. The Right to Housing

The right to housing is stated most prominently in the Universal Declaration on Human Rights[143] and the International Covenant on Economic, Social and Cultural Rights (ICESCR). In ratifying the ICESCR, New Zealand's Government undertook:

> "…to take steps… to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."[144]

The right to housing is enunciated in Article 11:[145]

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[142] United Nations "Status of International Covenant on Economic, Social and Cultural Rights" <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en>.
[143] Universal Declaration of Human Rights, Articles 1, 25.
[144] International Covenant on Economic, Social and Cultural Rights 1966, Art. 2(1)
[145] Ibid, at art 11.

> "The States Parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and *housing*, and to the *continuous improvement of living conditions*."

Fact Sheets and General Comments from the United Nations Committee on Economic, Social and Cultural Rights help us to understand the right to housing. The right to housing is the right "not just to the shelter of a roof and four walls but also to live somewhere with security, peace and dignity."[146] It includes security of tenure, habitability and cultural adequacy.[147] Health and safety standards for housing are important elements of habitability. Location is also important: the house must be in a location that allows access to adequate water, education and employment.[148] Finally, the housing must be affordable, which in New Zealand means that it costs no more than thirty per cent of a household's income. [149]

In all of this, the government is to strive "to realize the right for every individual in the shortest possible time in accordance with the maximum of available resources."[150] This includes by seeking partnerships with the community sector.[151]

The right to housing is intimately tied to other rights such as the rights to security, peace and dignity and to water, education and employment.[152] One human right that is particularly relevant to the right to housing in this context is the right to health. In the ICESCR, this is expressed as:

> The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

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[146] Office of the United Nations High Commissioner for Human Rights Fact Sheet No. 21 (Rev. 1): The Human Right to Adequate Housing (Geneva, 2009).
[147] Committee for Economic, Social and Cultural Rights *General Comment No. 4: The Rights to Adequate Housing (art 11.1)* HRI/GEN/1/Rev.9 (Vol.I) at [7].
[148] Committee for Economic, Social and Cultural Rights, *General Comment No. 4*, above n 59 at [7].
[149] Centre for Housing Research Aotearoa New Zealand *Affordable Housing in New Zealand* (2006). This was recently interpreted for a Christchurch context in the MBIE's Land Use Recovery Plan, page 32.
[150] Ibid, at [14].
[151] Ibid, at [14].
[152] See the International Covenant on Economic, Social and Cultural Rights arts. 6, 11, 12 and 13 for the rights to water, education and employment.

For a state to take steps towards the full realisation of the right to housing, it must also take steps towards the fulfillment of related rights.[153] This is no coincidence, as all rights must be fulfilled in the pursuit of human dignity: all rights are intimately tied together in pursuit of that ultimate goal.

The interconnectedness of all of the rights of an individual sits at the base of a "rights-based approach" to an issue. A rights-based approach to housing standards highlights other human rights that must necessarily be sought so that tenants can uphold those housing standards. It also calls the New Zealand government aspire to progressive realisation of these rights. Education, work and mental and physical health are examples of economic, social and cultural rights[154] that impact on a person's ability to enjoy their right to housing:

- A person who has not enjoyed their right to education may find the many complex legal processes discussed in this paper exceedingly difficult to access.
- Someone with mental or physical health problems may experience additional barriers challenging an authority figure like their landlord, or sustaining the will to go through lengthy legal processes.

Government bodies, in order to be acting consistently with the right to housing, must be looking at these other rights issues that affect people's access to their right to housing, and taking positive steps to remedy these kinds of problems. Participation is "the 'right of rights', because it allows people to claim their other rights."[155] It is not enough that the majority is able to use most processes most of the time.

7.3. Impact on domestic law

This section is about how the right to housing affects New Zealand law. In particular:

- How does the right to housing affect how to read New Zealand legislation?

[153] Committee on Economic, Social and Cultural Rights *General Comment No. 4* above n 59, at [9].
[154] International Covenant on Economic, Social and Cultural Rights, arts 6, 12 and 13.
[155] Alicia Ely Yamin "Suffering and Powerlessness: The Significance of Promoting Participation in Rights-Based Approaches to Health", 11 Health and Human Rights (2009) 5 at 6.

- What effect does the right to housing have on government bodies in New Zealand?

7.3.1. How to Read Legislation: the Presumption of Consistency

Arguments that international law affects the interpretation of New Zealand statutes are usually made in 'judicial review' cases. This is where one party is arguing that a government or public body has acted illegally, and asks the High Court to review the illegal action. Experts Claudia Geiringer and Matthew Palmer have observed, "New Zealand courts have expressed a general reluctance to bring their judicial review powers to bear in the area of socio-economic entitlement because of the 'political' nature of social policy questions."[156]

This was exemplified in a Christchurch case, *Lawson v Housing New Zealand Corporation*.[157] Mrs Lawson was a state housing resident who argued that the right to housing was a mandatory relevant consideration for Housing New Zealand in raising state housing rents. Williams J in the High Court responded,

> "Whether NZ has fulfilled its international obligations is a matter on which it may be judged in international forums but not in this Court."[158]

As such, the right to housing had no influence on Williams J's interpretation of the statutes empowering HNZC.[159] The court considered the principle set down by the Court of Appeal in *Tavita v Minister of Immigration*[160] that the Crown's international obligations are mandatory relevant considerations for public decision-makers. However, it was enough for Williams J that the principles that "underlie" the right to housing were considered, even though the right itself was never discussed by Housing New Zealand.[161] The High Court took a narrow view of its role and stood back from taking any responsibility to protect Mrs Lawson's right to housing.

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[156] Claudia Geiringer and Matthew Palmer, "Human Rights and Social Policy in New Zealand" 1 (30) Social Policy Journal of New Zealand (2007) 12 at 26.at 37.
[157] *Lawson v Housing NZ Corporation* [1997] 2 NZLR 474.
[158] Ibid, at 486.
[159] Ibid, at 489.
[160] *Tavita v Minister of Immigration* [1994] 2 NZLR 257.
[161] *Lawson v Housing New Zealand*, above n 157, at 499.

This traditionally narrow and restrictive approach to international law rights is changing in New Zealand. In *Zaoui v Attorney-General*[162] and *Ye v Minister of Immigration*,[163] the Supreme Court has discussed and used[164] the 'presumption of consistency.' The presumption is that Parliament's intent in creating any piece of legislation is to do so consistently with its international obligations, such that those international obligations shape the interpretation of the legislation itself. In *Zaoui*, the presumption was so strong that it existed except where there was specific statutory wording to the contrary.[165] The presumption has yet to be applied in the case of ESC rights.

7.3.2. The Right to Housing and Government Bodies

Government bodies are created by 'empowering statutes.' For the purpose of this section, an empowering statute is any statute that creates a government body or gives powers to a government body. Empowering statutes, like all other statutes, must be interpreted according to the presumption that they are written consistently with New Zealand's international legal obligations. This means that, unless specifically given the power to do so by statute, government bodies are unable to act inconsistently with New Zealand's international legal obligations.

In a broader sense, this also means that all government bodies *should aspire to the right to housing in the same way that government does as a whole*. This particular argument has never been tested in court: as discussed above, ESC rights are significantly under-litigated in New Zealand. Nonetheless, this will be a powerful argument to take before policy makers in the Ministry of Business, Innovation and Employment, the Ministry of Health, Local Authorities and other government bodies whose decisions and powers touch on the right to housing.

7.4. Impact on Housing Standards

The right to housing strengthens or gives rise to several arguments about how New Zealand's housing standards law should be used and applied:

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[162] *Zaoui v Attorney-General* (No 2) [2006] 1 NZLR 289.
[163] *Ye v Minister of Immigration* [2009] 2 NZLR 596.
[164] Hanna Wilberg "Administrative Law" [2010] New Zealand Law Review 177 at 195.
[165] Claudia Geiringer "International Law through the lens of Zaoui: Where is New Zealand at?" (2006) 17 Public Law Review 300 at 309.

- The Housing Improvement Regulations 1947 stipulated that a house must have a fireplace and chimney or other source of heating. Now, the Christchurch City Council will allow a house to simply have an electrical socket. This is the minimum standard imaginable, and it is a stretch to count a source of electricity as consistent with Parliament's intent in requiring a source of heating. Interpreting the Housing Improvement Regulations consistently with the right to housing and health, and New Zealand's commitment to 'continuous improvement' in its pursuit of the right to housing, this Christchurch City Council policy is inconsistent with the empowering statute.

- Participation is the right of rights. Local Authorities and MBIE must ensure that all people are able to access the Tenancy Tribunal processes under the RTA and the Local Authority processes under the Health Act and the Building Act. Participation for all people in the Right to Housing is contingent on transparency and ease of use in these systems. Public education and easily available and clear explanations of the systems will be necessary for people who have poor English literacy, limited intellectual capacity or suffer from mental disorders.

- The Tribunal has a discretion to determine what is 'reasonable' when interpreting sections 45(1)(a) and 45(1)(b) of the RTA. 'Reasonableness' must be interpreted in line with New Zealand's commitment to the Right to Housing and to continuously improve its alignment with the Right to Housing.

- The Tribunal has a broad discretion in making primary orders under section 78 RTA and secondary orders under section 108. This discretion should be exercised consistently with the right to housing: to ensure a tenant's security of tenure while increasing the habitability of their housing.

- The Tribunal has a discretion whether to make an exemplary damages order and a further commission order. This discretion should also be exercised consistently with the right to housing: to ensure the increased habitability of New Zealand's housing stock.

- The right to health is closely tied to the right to housing. Government bodies with responsibilities for housing must consider the health impacts of their planning and decisions.

- For MBIE and Local Authorities to maximise their resources, they need to actively seek partnerships within the Community Sector. This is not just pragmatic: it is the approach most consistent with the right to housing. This will be especially useful when seeking to remove barriers to process and maximise participation for vulnerable people.

8. Conclusion

Tenants in substandard rental housing in New Zealand have three main options for protecting themselves, although each has its flaws. There are two key routes for using the current law to raise the standard of rental housing in New Zealand. There are at least seven key changes that could be made to New Zealand's rental housing health laws that act as legal pressure points for change for tenants.

8.1. How can tenants in substandard rental housing in New Zealand protect themselves?

"Substandard" rental housing is defined throughout this report. Standards of cleanliness in the Residential Tenancies Act 1986 are discussed in section **2.1.1** of this report, in the Health Act 1956 at **3.1.2.a** and in the Building Act 2004 at **5.2.1.** Standards of repair are discussed in the Residential Tenancies Act in section **2.1.2** of this report, in the Health Act at **3.1.2.b** and in the Building Act at **5.2.1.** Other standards to do with the design of the house are discussed in the Health Act in section **3.2** of this report, the Housing Improvement Regulations 1947 at **4.3** and **4.5** and in the Building Act at **5.2.1.**

A tenant's best protection is to know the law and know their rights. They also need to know that they can go to the Tenancy Tribunal, their Local Authority and the Ministry of Business, Innovation and Employment for support and protection. The Tenancy Tribunal's powers are discussed in section **2.3** of this report. Local Authorities powers are discussed at **3.1, 4.3, 4.4, 5.2.2.b** and **6**. The Ministry of Business, Innovation and Employment's responsibilities are discussed at **2.4** and **5.2.**

8.2. How can health standards be used to raise the quality of rental housing?

A tenant's best route to raise the standard of their particular home is to seek a 'further commission order.' This route is discussed in section **2.4** of this report.

Tenants and tenant advocacy groups can raise the standard of rental housing generally by ensuring that cases are taken to the District Court. This raises the profile of healthy housing issues and creates legal precedent. Precedent means that other tenants can be more certain about their rights in the future, helping to address the power dynamics between landlord and tenant. There are several routes into the District Court: Tribunal

appeals are discussed in section **2.5.8** of this report, Health Act prosecutions are discussed at **3.2** (as is the possibility of tacking an Residential Tenancies Act claim to a Health Act prosecution), Building Act prosecutions are discussed at **5.2.2.a**, and Local Authority warrants to repair are discussed at **5.2.2.b.**

Key issues where tenants would benefit from the increased certainty offered by legal precedent are: the repair-based options at **2.1.2** of this report, whether not committing nuisances is a 'requirement' under section 45(1)(c) Residential Tenancies Act 1986 (discussed at **3.3** of this report), when a tenant can repair their property and charge their landlord under section 45(1)(b) Residential Tenancies Act (**2.1.2** of this report), what qualifies a rental property as a 'family home' (discussed at **2.2.2** of this report) and any place in legislation or legislative instruments where the words 'reasonable' or 'adequate' are used as a measure for healthy housing standards (**2.1** and **4.3** of this report).

8.3. Pressure Points for Legal Change

This report has identified several legal pressure points where changing the law would help tenants significantly. This report has not analysed the wider policy ramifications of changing these pieces of law. Key pressure points for change are:

1. **Introduce a Rental Housing Warrant of Fitness with measurable standards and regular inspections for private rental properties.** The measurable standards will give tenants the certainty they need to level the power relationship with their landlord, and is a much better approach than the current 'reasonableness' and 'adequacy' standards. The regular inspections will sidestep many of the disincentives tenants face when considering reporting the condition of their homes. Phil Twyford MP's Healthy Homes Guarantee Bill goes some way towards achieving these changes, but should not distract from the many other legal changes also necessary.

2. **Section 78(2) Residential Tenancies Act 1986 should be changed so that landlords do not have an option to pay tenants instead of doing the work, if the work is necessary to bring the house up to the legal standard.** This leaves it open to landlords to pay tenants out in other situations, or for tenants to pay

landlords out, but means that this provision will no longer undermine the improvement of housing standards for future tenants.

3. **Make it a requirement under section 45(1)(c) Residential Tenancies Act 1986 that landlords do not commit nuisances under the Health Act.** The nuisances are a range of health-centred standards that houses must not drop below. This change would mean that tenants could enforce these health-centred standards in the Tenancy Tribunal. This is currently an uncertain area of law.

4. **Change the offences in the Building Act so that it is not an offence to be a tenant in a sub-standard home.** At the moment, our law makes it as much of an offence for a tenant to live in a sub-standard home as it is for their landlord to rent it to them. This is a huge disincentive against tenants reporting sub-standard homes, so renders several Building Act protections ineffective. It is also unjust to tenants, who have usually not caused the problems that mean the house is insanitary or dangerous.

5. **Protect tenants' security of tenure when they report issues with their property.**

    a. Local Authorities need a wider range of powers when dealing with sub-standard properties. If they had the full range of Tenancy Tribunal powers, or were able to conduct their own repairs under the Health Act in the same way that they can under the Building Act, then they might have a diverse enough array of tools to protect tenants while raising housing standards. At the moment, the Local Authorities' tools are rather blunt, often leaving the Local Authority having to choose between evicting a tenant or leaving them in a substandard home.

    b. In the United Kingdom, tenants who lose their housing because it is substandard are entered onto a homelessness register and the local council has a duty to house them. This model is resource-intensive, but has the benefit of shifting the cost of reporting poor housing from vulnerable tenants to the more able state.

c. Landlords do not need a good cause to evict tenants on periodic tenancies, making tenants vulnerable to their landlords if they complain about the housing standard. The Tenants Protection Association in Christchurch advocates for requiring a 'good cause' for eviction, similar to in employment law.

6. **Government systems need to be more accessible to people whose right to healthy housing is in danger.**

   a. Tenancy Tribunal Orders could be a great resource for tenants to understand housing standards and their own rights. Unfortunately, they are very difficult to access and cannot be searched by issue. This is a significant barrier to tenants having the kind of certain knowledge they need to balance the power relationship with their landlords.

   b. Local Authorities and the Ministry of Business, Innovation and Employment need to make their systems as accessible as possible for tenants. The MBIE's compliance unit needs to be much better publicised for helping tenants. Local Authorities need to take a rights-centred approach to interpreting and applying the Building Act, Health Act and Housing Improvement Regulations. This means giving specific thought to accessibility and the other rights issues, like health and education, which are tied closely to housing issues for many vulnerable tenants.

7. **Increase the fines for committing offences against healthy housing standards.** Building work is expensive, and owning a property requires a lot of capital. The fines for renting a property beneath legal standards are consistently low, and would do little to deter a landlord from renting a sub-standard property. The maximum 'exemplary damages' order is $3000: that is only ten weeks of rent for an average 2-bedroom place in Christchurch. Increased fines can give the rest of the law teeth, and disincentivised landlords from gambling on tenants not reporting faults.

Most landlords provide healthy housing for their tenants. Landlords who can't do this should not be in the rental market. Tenants have a right to live in healthy homes.

9. Appendices

9.1. Appendix 1: Legislation in Full

Section 45 RTA provides:

Landlord's responsibilities

(1) The landlord shall—

(a) Provide the premises in a reasonable state of cleanliness; and

(b) Provide and maintain the premises in a reasonable state of repair having regard to the age and character of the premises and the period during which the premises are likely to remain habitable and available for residential purposes; and

(c) Comply with all requirements in respect of buildings, health, and safety under any enactment so far as they apply to the premises; and

(ca) if the premises do not have a reticulated water supply, provide adequate means for the collection and storage of water; and

(d) Compensate the tenant for any reasonable expenses incurred by the tenant in repairing the premises where—

(i) The state of disrepair has arisen otherwise than as a result of a breach of the tenancy agreement by the tenant and is likely to cause injury to persons or property or is otherwise serious and urgent; and

(ii) the tenant has given the landlord notice of the state of disrepair or made a reasonable attempt to do so; and

(e) Take all reasonable steps to ensure that none of the landlord's other tenants causes or permits any interference with the reasonable peace, comfort, or privacy of the tenant in the use of the premises.

(1A) Failure by the landlord to comply with any of paragraphs (a) to (ca) of subsection (1) is declared to be an unlawful act.

(2) The landlord shall not interfere with the supply of gas, electricity, water, telephone services, or other services to the premises, except where the interference is necessary to avoid danger to any person or to enable maintenance or repairs to be carried out.

(2A) A contravention by the landlord of subsection (2) is declared to be an unlawful act.

(3) The provisions of subsection (1) of this section shall apply notwithstanding that the tenant has notice of the state of the premises at the time at which the tenancy agreement is entered into.

(4) Nothing in subsection (1) of this section shall impose upon the landlord any obligation to repair any damage, or compensate the tenant for any want of repair, arising out of any breach by the tenant of any obligation imposed on tenants by section 40 of this Act.

(5) In this section premises includes facilities.

Section 78 RTA provides:

Orders of Tribunal

(1) Without limiting the generality of section 77 of this Act or the nature or extent of orders that the Tribunal may make in the exercise of its jurisdiction, the Tribunal may, in respect of any claim within its jurisdiction, make one or more of the following orders:

(a) An order in the nature of a declaration, whether as to the status for the purposes of this Act of any premises or of any agreement or purported agreement, or as to the rights or obligations of any party, or otherwise:

(b) An order that a party yield possession of any premises to any other party:

(c) An order that a party deliver any specific chattels to any other party:

(d) An order that a party pay money to any other party:

(e) A work order:

(f) Where it appears to the Tribunal that an agreement between the parties, or any term of any such agreement, is harsh or unconscionable, or that any power conferred by an agreement between them has been exercised in a harsh or unconscionable manner, an order varying the agreement, or setting it aside (either wholly or in part):

(g) Where it appears to the Tribunal that an agreement between the parties has been induced by fraud, misrepresentation, or mistake, or that any writing purporting to express the agreement between the parties does not accord with their true agreement, an order varying, or setting aside, the agreement or the writing (either wholly or in part):

(h) Any other order that the High Court or a District Court may make under any enactment or rule of law relating to contracts:

(i) An order dismissing an application.

(1A) A person with an interest in premises that are not subject to a tenancy agreement may apply, without notice, to the Tribunal for an order under subsection (1)(a) declaring the status of the premises for the purposes of this Act.

(1B) An order made on an application under subsection (1A) is binding on all parties to any subsequent proceedings before the Tribunal, but the Tribunal may, on application made in any such proceedings, rescind the order if satisfied that the order is wrong or, because of a change in circumstances, no longer applicable.

(2) Where the Tribunal makes a work order against a party, it—

(a) Shall, where the order is made otherwise than by consent; and

(b) May, where the order is made by consent,—

at the same time make an order under subsection (1)(d) of this section to be complied with as an alternative to compliance with the work order.

(2A) Where the Tribunal makes an order under any of paragraphs (b), (c), or (h) of subsection (1) of this section, the Tribunal may at the same time make an order under subsection (1)(d) of this section to be complied with as an alternative to compliance with the first-mentioned order.

Section 109 RTA provides:

Unlawful Acts

(1) A landlord or a tenant, or the **[**chief executive**]** acting on behalf of a landlord or a tenant, or the **[**chief executive**]** acting as the person responsible for the general administration of this Act, may apply to the Tribunal for an order requiring any other person to pay to the applicant an amount in the nature of exemplary damages on the ground that that other person has committed an unlawful act.

[(2) No application may be made under subsection (1) of this section later than—

(a) 12 months after the termination of the tenancy in the case of—

(i) An unlawful act to which section 19(2) of this Act refers; or

(ii) A failure to keep records in respect of bonds that is an unlawful act to which section 30(2) of this Act refers; or

(b) 12 months after the date of commission of the unlawful act in the case of any other unlawful act.**]**

(3) If, on such an application, the Tribunal is satisfied that the person against whom the order is sought committed the unlawful act intentionally, and that, having regard to—

(a) The intent of that person in committing the unlawful act; and

(b) The effect of the unlawful act; and

(c) The interests of the landlord or the tenant against whom the unlawful act was committed; and

(d) The public interest,—

it would be just to require the person against whom the order is sought to pay a sum in the nature of exemplary damages, the Tribunal may make an order accordingly.

[(4) The maximum amount that a person may be ordered to pay under this section for any unlawful act referred to in any section shown in the first column of Schedule 1A is the amount shown opposite that section in the second column of that schedule.**]**

[(4A) The Tribunal may make an order against a person on the ground that the person committed an unlawful act even though the conduct that formed part of that act also formed part of an offence or an alleged offence against section 109A(4) in respect of which the person has been charged, convicted, or acquitted.**]**

(5) Any amount ordered by the Tribunal to be paid under this section on the application of a landlord or a tenant, or on the application of the **[**chief executive**]** acting on behalf of a landlord or a tenant, shall be paid to that landlord or that tenant, and shall be in addition to any sum payable to that landlord or that tenant by way of compensation in respect of the unlawful act.

[(6) Any amount ordered by the Tribunal to be paid under this section on the application of the chief executive acting as the person responsible for the general administration of this Act shall be paid to the Crown.**]**

[(7) Notwithstanding subsection (5) of this section and section 124(4)(d) of this Act, if the chief executive is acting under section 124(3)(b) of this Act, any amount ordered by the Tribunal to be paid under this section on the application of the chief executive shall be paid to the chief executive and retained by the Crown.**]**

Section 109A RTA provides:

> **Tribunal may restrain further commissions of unlawful acts**
> (1) If the Tribunal makes an order against a person under section 109 on the ground that the person has committed an unlawful act, the Tribunal may, if satisfied that it is in the public interest to do so, make an order restraining the person from committing a further act of the same kind.
> (2) The Tribunal may make an order under subsection (1) on its own initiative or on the application of the applicant who applied for the order, under section 109, against the person sought to be restrained.
> (3) The Tribunal must specify the term of the order, which may not exceed 6 years.
> (4) Every person commits an offence who, being subject to an order under this section, intentionally contravenes the order.
> (5) A person who commits an offence against subsection (4) is liable on summary conviction to a fine not exceeding $2,000.

9.2. Appendix 2: Alterations in the Building Act Reasoning

Many types of work that the Tribunal may order will count as 'alterations' in the BA. To 'alter' a building includes to rebuild, re-erect, repair, enlarge or extend it.[1] This is a catch-all definition, and may go beyond these five categories of work. Where an alteration is made to a building:

- The alteration itself must comply with the building code;[2]
- The whole building must comply with the building code's provisions relating to means of escape from fire; and
- The whole building must continue to comply with the building code at least as much as it did prior to the alteration being made.[3]

This is why the 'alteration' argument is a weak means to try to bring a whole building fully up to Code. The attractive argument that forcing alterations may force a landlord to bring whole parts of their building up to Code will only apply to the limited extent described in these three bullet points.

The 'alterations' requirements will sometimes be imposed on landlords before the building work is carried out, and sometimes will not be imposed until afterwards. This is because some building work requires consent from a building consent authority before it is carried out, and some does not require consent.[4] A landlord will require consent for any alterations, except the many types of work specifically listed in the BA.

If the work requires consent, then it is an offence punishable by a fine up to $100,000 for a landlord to carry out the work without consent.[5] The list of work that doesn't require consent includes:

- alterations to existing sanitary plumbing;

[1] S 7 Building Act 2004.
[2] S 17 Building Act 2004.
[3] S 112 Building Act 2004.
[4] Ss 40, 41 Building Act 2004.
[5] S 40 Building Act 2004.

- installation, replacement, or removal in any existing building of a window (including a roof window) or an exterior doorway if the work does not reduce code compliance regarding structural stability and the old window or door satisfied the Code's durability requirements;
- alterations to an entrance or an internal doorway of a dwelling to improve access for persons with disabilities, if compliance with the provisions of the building code relating to structural stability is not reduced; and
- replacement or alteration of linings or finishes of any internal wall, ceiling, or floor of a dwelling.[6]

The net effect of the alterations provisions is that most 'work orders' likely to be made by the Tribunal will not need to be overseen or consented to by a building consent authority. The work itself must still comply with the Code, and once the work is done, the house must comply with the Code's provisions relating to means of escape from fire. Aside from those requirements, the rest of the house may remain at the same level of compliance with the Code as it was before the work was carried out.

[6] Schedule 1 Building Act 2004.

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